

CUSTOMARY LAW AND ADMINISTRATION OF

JUSTICE IN MALAWI 1890 - 1933

BY

Emily Nyamazao MALIWA

Thesis submitted  
for the Degree of  
M. PHIL.

LONDON UNIVERSITY,  
1965.

ProQuest Number: 10731241

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



ProQuest 10731241

Published by ProQuest LLC (2017). Copyright of the Dissertation is held by the Author.

All rights reserved.

This work is protected against unauthorized copying under Title 17, United States Code  
Microform Edition © ProQuest LLC.

ProQuest LLC.  
789 East Eisenhower Parkway  
P.O. Box 1346  
Ann Arbor, MI 48106 – 1346

## CONTENTS

### Customary law and the Administration of Justice in Malawi 1890 - 1933.

	<u>Page</u>
Abstract	1
Preface	4
<u>PART I</u>	
<u>Chapter One</u>	
<u>Law of Persons</u>	13
Male Adult	13
Women	17
Infants	25
Aliens	32
Slaves	34
Lunatics	45
<u>Chapter Two</u>	
<u>The Law and Classification of Wrongs</u>	47
Crimes	54
Burglary	61
Drunkenness	63
Cases relating to women	64
Adultery	64
Other Crimes	69
Property law	71
<u>Chapter Three</u>	
<u>Family Law Marriage, Divorce and Inheritance</u>	78
Other Forms of Marriage	82
Bride price	91
Polygamy	92
Widowhood	98
Position of wives	101
Marriage with slaves	102
Divorce	103
Adultery	104
Property after divorce	105
The position of children after divorce	106

Inheritance and Succession	108
----------------------------	-----

#### Chapter Four

<u>Courts</u>	112
Composition of Courts	116
The Chief	120
The Village Headman	128
Procedure	132
Mwavi Trial	134
Diviner	137
Witchcraft	139
Criminal cases	141
Appeals	147
Sanctions	149

#### PART II

#### Chapter Five

<u>Establishment of Courts of Justice in Malawi</u>	151
District (Native) Administration Ordinance, 1912	181
The District (Native) Administration Ordinance, 1924	190
The duties of Principal Headman	193
(a) The Native Authority Ordinance, 1933	201
(b) The Native Courts Ordinance, 1933	215
The Position of Hereditary Chief under Various Ordinances	228

#### Chapter Six

<u>The Law of Persons</u>	251
The Role of Male Adult	251
Women	273
Infants	278
Aliens	282
Lunatics	284
Property of the lunatics	292

#### Chapter Seven

<u>Courts of Appeal</u>	293
District Native Court of Appeal	298
District Court of Appeal	299
The High Court of Nyasaland	308



	<u>Page</u>
The Supreme Court of Appeal for Nyasaland at Cape Colony	303
The East African Court of Appeal	306
Powers of Courts of Appeal to call Assessors.	309
The High Court Practice and Procedure Ordinance, 1906	312
Other Courts of Appeal	314

## Chapter Eight

<u>New Offences</u>	315
Trial by Mwavi	315
Ordinances to regulate the Intoxicating Liquor.	323
Rules regarding hunting	326
Seditious publications	328
Epilogue	333
Abbreviations	346
Sources	347
Interviews	355

## ABSTRACT

The question of administration of justice was one of the problems facing the British Administration in Malawi during its early days, the reasons being that there were many social groups in the country each having its own different code of law. To bring these various social groups under one administration, and to have their laws administered by British officers as the only machinery of justice, it was necessary to establish one comprehensive system of law.

It is to be expected that with the advent of a new and alien administration, a conflict of laws between those brought in by the new administration and those that were indigenous should occur. This study seeks to examine these conflicts.

Part I of this work tries to examine the numerous codes of law practised by various social groups of Malawi at the time of the establishment of British rule.

Part II will attempt to examine why and how some of these existing laws were abolished or modified by the ordinances passed by the British administration.

The fact that certain customary laws were abolished or modified led to the creation of new offences such as the laws regarding hunting, which, before the British came, was a source of pleasure as well as sustenance for the people,

but which now, under the new rule, was made illegal. Section 20 of the British Central Africa Order in Council 1902 laid down that native law and custom were to be adhered to, if and when required, unless repugnant to justice and morality. The standards of justice and morality, however, in these cases, were not those of the people of Malawi, but those of the English. An apparent conflict arising from the application of such standards of justice and morality was seen in the cases of adultery, mwavi trials and marriages, as understood by the African people.

In order to effect modifications in the practice of customary law, the British administration required an authority from Her Majesty's Government. The authority to introduce such a system was contained in the Africa Order in Council of 1889, which authorised that the Common Law, Statutes and rules of equity enforced in England were to be applied in the administration of British and British protected subjects. The 1893 Africa Order in Council authorised the administration of Malawi by British officers.

The machinery to put into effect such a system was gradually developed. First were the Consular and Collector's Courts which were established in many districts of the protectorate. They were to preside over cases where Europeans and Asians only were parties or where a European and an African were involved in any dispute. Powers of

Consulars and Collectors as judicial officers were extended to deal with cases where Africans only were parties.

During this period, that is, 1890-1902, when Collectors and Consular Courts were abolished, hereditary chiefs were encouraged to try minor cases.

A further attempt to systematize the administration of justice and that of local government was brought about in 1912, when Governor William Manning, the Governor of Nyasaland, proposed to the Colonial Office to put into effect a system of Principal Headmanship, thereby indirectly resulting in the replacement of hereditary chiefs, as the Governor had power to appoint any person or chief to act as the Principal Headman. This is dealt with in Part II.

## PREFACE

As the main object of this work is to deal with two systems of laws, it has, for the sake of convenience, been divided into two parts; Part I deals with Malawi's customary law and Part II deals with the effect of English law on the former. Ordinances were passed to abolish or modify the customary laws. Hence, Part I deals entirely with the customary laws as they were before the establishment of British Rule in Malawi. Due to lack of written evidence by African people on the nature of their laws and customs, it has been found necessary to supplement this deficiency with interviews with elderly Malawi people who have visited England since this work was started, especially after Independence of Malawi in 1964 when more Africans have been to London on official visits. Among these people were the chiefs whose opinions and knowledge have been put to constructive use.

I have been careful in my interviews to select people who were in Malawi during at least the latter part of the period of this work, that is during the 1920's and 1930's. This selection was made bearing in mind that they were in close contact with those who were directly connected with the chiefs who dealt with the early British administration. On this ground it will be noted throughout this work that the present chiefs in Malawi have been quoted whenever

their information in my interviews with them has been appropriate.

No interview has been made with anyone who may not have had knowledge of the affairs during the period of my work.

I have made use of many anthropological works which constitute some of the written evidence I have depended on in dealing with customary laws of Malawi. It will be noted also that although this work is mainly historical it has been necessary to make constant use of anthropological works due to their substantial contribution to the study of Malawi societies. I have, however, used these anthropological works with care; it has been necessary to corroborate such works with historical evidence as well as the evidence of the pioneering missionaries who directly dealt with African people with whom they worked. Thus it can be noted that pioneers such as David Livingstone, Rowley, Duff Macdonald, W.A. Elmslie and many other missionaries have been constantly quoted throughout this work.

Other works which have also been used extensively are the following: Gamitto's King Kazembe, Werner's Natives of British Central Africa, Sir Harry Johnston's works, and particularly his British Central Africa; in addition Coupland's Kirk on the Zambezi, Mitchell's study of the Yao, Shepperson and Price's Independent Africa<sup>n</sup>, R.

Oliver's Sir Harry Johnson and the Scramble for Africa,  
 Hanna's Beginnings of Nyasaland and North Eastern Rhodesia.  
 These and many others have all provided me with interesting  
 material for my work.

As can be seen from the nature of the work in  
 Part II, it will be appropriate to state that the bulk of  
 its sources has come from the following:

- i) Ordinances passed by the then Nyasaland  
 Legislative Council, including some of the  
 minutes of the Legislative Council;
- ii) Certain U.K. Statutes expressly applicable  
 to Malawi;
- iii) Occasionally Common Law of England, Rules of  
 Equity and Statutes;
- iv) Religious laws existing in Malawi such as  
 Islam <sup>ie law</sup> which is practised and governed their  
 domestic relationships;
- v) Customary laws of various social groups,  
 whenever these are applicable to Part II;
- vi) Finally and occasionally, acts passed by the  
 Malawi Government since the Independence of  
 Malawi in 1964.

The following correspondence has also been used: corres-  
 pondence of the Colonial Office in C.O. 525 and Foreign  
 Office correspondence in F.O. 2 and F.O. 84 series. But

most of this correspondence as found in the dispatches of the Commissioners and Consuls General was later enacted as ordinances once approved. So it has been found in some cases that the reasons given in the dispatches were later discussed in greater detail in the Nyasaland Legislative Council, once such proposals were approved by the Foreign Office. Hence I have found the discussions of the Legislative Council more helpful to my work, because such Legislative Council proceedings included the views of non-Government officials in the Legislative Council such as the Reverend Doctor Hetherwick, who often spoke for the needs of the African community. Their views are of importance because there were no African members in the Legislative Council during this period and the grievances of the Africans were made known by the missionaries whom the Africans could contact personally.

Another source which I have extensively used is the reports of Commissioners appointed to inquire into various causes of certain problems in the Protectorate. Among them are the Commission appointed to inquire into various causes for the 1915 "Native Rising".

Another report which I have constantly referred to is the Commission of Enquiry Appointed to Enquire into the Financial Position and Further Development of Nyasaland.

More reports which I have used will be found



listed under the Selected Bibliography.

As this study is dealing with the customary laws of Malawi societies it is important to discuss in outline the social groups dealt with.

When Nyasaland was first declared a British Protectorate in 1891, by the Africa Order in Council of 1889, it was stated that the Courts in Malawi were to apply native law and custom in settling African disputes, unless those customary laws were repugnant to common law, statutes and the rules of equity in force in England.<sup>1</sup>

The native custom and laws referred to in the Ordinance were of the tribes then in Malawi, the main ones being:-

The Nyanja who by the time the Protectorate was established occupied most of the southern part of the country. Nyanja are a branch of the Maravi people.<sup>2</sup>

The Lomwe, mainly found in the Mlanje, Chiradzulu and Zomba districts. They emigrated from Portuguese East Africa during the latter part of the 19th century.<sup>3</sup>

The Yao, occupying a large part of Zomba, Kasupe,

- 
1. S.S. Murray, The Handbook of Nyasaland, The Government Printers, p. 147.
  2. Livingstone, D. and C., The Zambezi and its Tributaries, op. cit., pp. 105 and 110.
  3. Lord Hailey, Native Administration in the British African Territories, Part II, London, His Majesty's Stationery Office, p. 24. But also see Gamitto on the Nguru, another name for Lomwe, being found on the banks of Lake Nyasa.

Fort Johnston and Blantyre. In the early days of British administration they were engaged in slave trade and gave much trouble when the administration was trying to suppress the slave trade.<sup>1</sup> The Yao continued to engage in slave trade until it was finally abolished. It is believed that the influence of the Arab slave traders did not affect the legal system of marriage of the Yao people in spite of having been in close contact with them for a long time.<sup>2</sup>

The Ngoni, occupying both parts of Central and Northern Provinces. They arrived in Malawi during the early 19th century.<sup>3</sup> During their early days in Malawi, they tried to suppress other tribes within the country, and although successful before the establishment of British Government in defeating the Tonga, the Tumbuka and other smaller groups in the Northern Province, they were bitterly defeated in 1895 under the leadership of Sir Harry Johnston who was then the Councillor of the British Government in Malawi.

The Tumbuka, Ngonde, Tonga and Henga all occupying most of the districts in the Northern Province. With

- 
1. H.H. Johnston, British Central Africa, London, 1897, p. 387.
  2. Hetherwick, A., "Islam and Christianity in Nyasaland", The Muslim World, Vol. 17, 1927, pp. 184-6.
  3. Lancaster, D. Gordon, "Tentative Chronology of the Ngoni", The Journal of the Royal Anthropological Institute, Vol. LXVIII, pp. 78-9 & 85, 1937.

the exception of the Ngonde who have a distinct system of law<sup>1</sup>, the other tribes in the Northern Province seem to have somewhat similar systems of law. Their similarity will be noted in the discussion of their laws in this thesis.

The Acewa are found in the central province of Malawi<sup>2</sup> and still inhabit that area. As is the case with the Nyanja people, they also belong to the Malawi stock.

The object of this thesis is to seek to examine how the customs and laws of these people were administered under foreign rule. Looking at the constant movements of the tribes enumerated above it would seem that their customs must have been uncertain in most cases unless the entire village or tribe moved together. But as their unity began to grow through the rise of nationalism their customs and laws appeared to have narrowed down and merged, especially after the introduction of English law through the ordinances. In addition, the growth of nationalism seems to have brought about inter-marriages among different tribes, thereby narrowing their customary differences. However, it will be seen in the thesis that certain differ-

- 
1. Wilson, G., "The Constitution of the Ngonde", Rhodes-Livingston Papers, Volumes 1-8, 1939, p. 48.
  2. Johnston, H.H., British Central Africa, op.cit., pp. 175-177. See also Gamitto, A.C.P., King Kazembe, Vol. 1, p. 141.

ences in their customs could not be changed, having been well developed before the rise of nationalism, or introduction of Christianity, nor was the British Government able to change some of these well-developed customs. Among such customs to be seen even today in Malawi are those of marriage. Thus although Christian Marriage Ordinances were passed to regulate some of the systems of marriages in the country they did not change certain practices in marriages. Thus bride price is still practised among certain tribes in Malawi, while polygamy is an accepted system despite the fact that it is contrary to English rules of law and Christian beliefs.

Finally I must state that I am not able to find adequate words to express my sincere gratitude to my joint supervisors, namely Professor A.N. Allott and Professor Roland Oliver, whose patience and guidance made it possible for me to acquaint myself with the system of research work I was to embark on, a system so new to me after having been under American system of research which I did for my M.A.

This study would have taken longer than it has actually taken had I not been under the constant supervision of my later supervisor Dr. J. Richard Gray, but for whose objective criticism and guidance this work would have been deemed somewhat partial, considering that I am a Malawi

citizen by birth, and therefore presumably unable to rise above one's own national concepts, beliefs and prejudices.

My thanks are also due to members of the Commonwealth Society Library for having all the necessary Malawi gazettes and other reports at my disposal whenever I required them. I also thank members of the British Museum State Papers Department, Public<sup>Records</sup> Office, the School of Oriental and African Studies, etc.

To Dr. M. Douglas (formerly Mary Tew) and Professor Margaret Read I owe heartfelt thanks for their comment and encouragement in my work, and for letting me make use of their personal papers.

And to the people of my country who gave me the opportunity of interviewing them whenever they came to England.

I also owe my gratitude to Mrs. N. Waterson, Adviser to Women Students at the School of Oriental and African Studies, for the contacts she made on my behalf to people whose help has expedited the completion of my work.

Finally I thank all the ex-District Commissioners and Provisional Commissioners who gave their comments on the chapter on the District Commissioners and Provisional Commissioners in Malawi.

## CHAPTER I

Legal persons were comprised of ordinary men, women, infants, the aged and impotent, lunatics and aliens. They had a recognised status in the community. Parents, uncles, old people, the headmen and chiefs were very much respected, but were not exempted from the law. Freedom of speech and freedom to quit a village were one of the greatest joys of village life. It is stated that everybody was equal in material wealth and everybody had the same rights and the same duties, hence they were expected not to interfere with other people's rights. Macdonald explained that the people of Southern Malawi had little knowledge of division of labour and that "they have the same manners, customs, beliefs and occupations."<sup>1</sup> Macdonald may have witnessed this but his assertion should be qualified in that every village had a chief or sub-chief, then a village headman and then only the villagers themselves. Therefore, their duties and rights could not have been the same. It is also noteworthy that women and men had different rights and duties as will be explained in their appropriate passages.

### Male Adults

Among the Chewa, Yao, Lomwe, Nyanja and Makololo, descent is matrilineal. The husband is not accepted as

---

1. Macdonald, Duff, Africana, Vol. 1, p. 29.

the head of the family which he, his wife and children have formed. Benno Heckel deduced that he "was the guest and servant in the family of his parents-in-law".<sup>1</sup>

A peculiar feature of this society is the dual role played by the eldest male adult, who, as the uncle of the family, has undisputed power over its members, yet is completely powerless over his own wife and children, who in their turn are under the influence of their uncle. In patrilineal society, the male adult who happens to be the head of the family is the most important member. His power over his family can be compared to that of a village headman over his subjects. Among such tribes are the Ngoni, Ngonde, Tumbuka, Tonga and Henga, and a few others. In both matrilineal and patrilineal societies a male adult owed allegiance to his tribe and therefore to his chief. He ought to be capable of defending his tribe as tribal societies had no military organisation into armies, and it stands to reason that there was no recruitment. However, regarding this fact, it can be pointed out that, though they may not have had regular armies in the true use of the word, it was certain that men of these tribes had to be on the ready for action at a moment's notice; so it can be safely said that there was always a potential army standing by for action.

---

1. Heckel, Benno, "The Yao Tribe", Studies and Reports No. 4, Institute of Education, Oxford University Press, 1935, p. 19.

The one exception to the statement that there were no regular armies is the case of the Angoni, who not only had a potential army but also had a regular force<sup>1</sup>, known as the "Impi", i.e., the recruitment of warriors. The selection of such candidates was made by the Makosana (members of the chief's house - blood relations), the Inkosi Yamakosi (the paramount chief) and the Nduna (House of Elders) who in so doing, stressed the essential qualities of strength and good health in the boys aged between 10 and 15, who, once chosen, had to remain in the force as long as they were required. The qualified men from the school of "Impi" were posted to strategic areas of the kingdom, the strongest being the guards of the Inkosi Yamakosi. When an attack was immanent, whether it was the organised "Impi" or the potential army, the male adults, regardless of their age, were summoned to war by a drum called Alg'oma. They armed themselves at their own cost, with anything from poisoned arrows, spears, axes to cutlasses.<sup>2</sup>

The Angoni military system was later adopted by the Tumbuka and perhaps by the Tonga.<sup>3</sup> The "Impi" were

---

1. Read, M., The Angoni of Nyasaland, op.cit., p. 31.

2. Livingstone, David & Charles, The Zambezi and its Tributaries, op.cit., p. 96.

3. Young, T., Notes on the History of Tumbuka and Kamanga Peoples, Mission Press, Livingstone, 1931, p. 127.



sometimes hired by other chiefs such as Chief Malemia, the Yao chief, who hired the "Impi" to fight against his enemy, Chief Kuntaja.<sup>1</sup> Although Kuntaja was defeated by "Impi", Malemia still was not quite free from the Ngoni political power.

This would appear to be one of the reasons why the Angoni were the last to surrender their suzerainty and their traditional system to the British. An exception to the general practice amongst the tribes of recruiting males of any age, was the Yao youth who was not called up for such services until he had gone through the ceremony of initiation, where he was taught not only the way of village life, i.e. his behaviour towards village elders, but he was also given instructions as to how to stand up to the enemy. Heckel said, "From this time onwards they are considered as adults having the rights and duties of grown men and being obliged to give up all childish things and habits. They are no longer allowed to join the children..."<sup>2</sup> This was the most important aspect of tribal life, initiation into manhood. Between the ages of fourteen and seventeen when a boy's voice broke and he has had his 'dream' he becomes initiated into the duties and the loyalty of his

---

1. Buchanan, John, The Shire Highlands, William Blackwood & Sons, London, 1885, p. 101.

2. Heckel, Benno, Op. cit., p. 24.

tribe<sup>1</sup>, unlike in English law where a man is not recognised as reaching adulthood until he attains the age of twenty-one, when he is no more considered an infant.

### Women

Dr. Karl Weule in writing of East and Central Africa stated, "Our manuals of ethnology give a terrible picture of the lot of women among primitive people. 'Beast of burden' and 'slave' are the epithets continually applied to her. . . The fact is that the women are in no danger of killing themselves with hard work."<sup>2</sup> Dr. Karl Weule may be correct in that the women of Malawi were in no danger of killing themselves with hard work, but this does not disprove the fact that they were overworked and burdened, just as it was in any primitive community, where women were looked down upon. The fundamental thing was that the women did most of the hard work. However, it is necessary to note that women were in fact always in danger of killing themselves; but such danger was more immanent during pregnancy and at childbirth, where medical treatment was less advanced. It is also to be noted that most work was done not only by the senior wife but also by junior wives, daughters and by slaves, if any.<sup>3</sup> Hence the work

---

1. Heckel, Benno, The Yao Tribe, pp. 21-22.

2. Weule, Karl, Native Life in East Africa, Pitman & Sons Ltd., 1909, pp. 162-3.

3. Werner, A., Op. cit., p. 136.

though hard was often divided among the women and lessened the burden. Again this custom prevailed for the majority of women but did not apply to Royal women such as the Ngoni, whose work was done by their servants or slaves (before slavery was abolished), or by commoners. Livingstone in his work on the Malawi people mentions Makololo servants who did all the work which in normal cases was done by the women themselves.<sup>1</sup> Read gives us the following quotation, regarding Ngoni Royal women:

"The common features of the life of leading women as illustrated in these texts were: the number of attendants and servants in their households and their consequent freedom from manual work; the etiquette surrounding life in the indlunkulu and the big house, and the formality of hospitality, beer-drinks and dances; relationships with their induna and with their husbands, and, as illustrated by Margaret Jere, with the paternal grandmother who supervised their upbringing when they were young."<sup>2</sup>

Again, Livingstone noted that Nyanja women chiefs were respected by all villagers and even village headmen took secondary place in her presence.<sup>3</sup> This observation of Livingstone is true because there is no higher authority in a community than that of a chief and hence even a woman chief comes above the male village head-man. It is

- 
1. Livingstone, David & Charles, The Zambezi and its Tributaries, op.cit., pp. 304-5.
  2. Read, M., The Angoni of Nyasaland, op.cit., p. 84.
  3. Livingstone, David & Charles, The Zambezi and its Tributaries, p. 108, also recorded in British Central Africa Gazette, December 1897.

customary among Malawi women to kneel when a man passes by- it is not a sign of inferiority but an indication of respect. During pregnancy, women were supposed to avoid meeting men and it was usual for them as well as for unmarried girls to remain at home, but if they met a man on a path, they had to step aside and turn the other way; consequently, they avoided familiarity with strange men and their chastity was preserved. Another aspect of this behaviour was to show courtesy to strangers.

Although it is believed that women were excluded from men's functions, they were the leading figures in some social and religious functions.<sup>1</sup> They also joined men in beer-drinking. It is not surprising that women were allowed to join in beer-drinking, while they were not allowed to eat together with their husbands, as beer-drinking was a social function where anyone could join in. But even in this case the women, allowed to join in, were often the brewers of the beer.<sup>2</sup> The main reason why women brewers were allowed to join men in the drinking would seem to be due to fear that if the beer was poisoned by witchcraft, the brewer herself would be the victim and the rest would not take it. In this case it would seem that she must test the beer each time a customer buys it.

---

1. Read, M., The Angoni of Nyasaland, p.32.

2. Interview - R. Katengeza.

Both among the Ngoni and the Yao senior women held important positions in village disputes.<sup>1</sup> They helped to settle disputes by their judicious handling. They kept cases out of court, by constant supervision of the junior women, and in so doing, they enhanced their standing in the community. Among the senior Ngoni women, each senior woman had a group of young women who were junior to her, and whom she supervised in households. She supervised them in her own house as well as that of the co-wives and her sons' wives.

It is also interesting to note that the senior women also worked as midwives.<sup>2</sup> Their importance was noticed in initiation ceremonies. Mothers in patrilineal societies had much power over their children, but only when the children were young. When such children grew up,<sup>3</sup> they came under the guardianship of their fathers' sisters or their grandmothers. This is so because in such societies children belong to their fathers and such practice is stronger where bride price is paid. Women's importance was further enhanced because husbands were usually away in employment, such as "Mtenga Mtenga" - i.e., carrying

---

1. Read, M., The Angoni of Nyasaland, op.cit., p. 124.

2. Ibid., pp. 124-5.

3. Ibid., pp. 134-5.

European travellers' goods for a small payment. Sometimes they carried the Europeans themselves on the "machila" - stretcher. Women, during such intervals, guarded the husband's interest at home. "Thus, women had great authority behind the scenes, although men were accepted as the carriers of authority."<sup>1</sup> One often heard that such-and-such a woman was the real owner of the name. This was so because most of the house duties were dealt with by the woman while her husband was away. She in fact carried out all the functions of the husband in the house till he returned, except that she could not, when her husband was away, settle disputes within her own family, and also could not receive strangers, in which case, she had to call her uncle. It is also true that it was very rare for her to be executive of her husband's title. This was left to a man who, although often away, represented the title in the courts or on other public occasions,<sup>2</sup> unless she came from a matrilineal society where the uncle did all executive duties.

The influence of the mothers over their children, both daughters and sons, should not be overlooked. Sons, whose fathers were away for a long time, were bound to be

---

1. Van Velsen, J., The Politics of Kinship, op. cit., p. 71.

2. Ibid., p. 71.

under strong control of their mothers. The mother's control was more of love for sons than disciplinary control which only the father could give. This was more so when the son was a grown-up boy who would give very little attention to his mother's advice. Apart from the above-stated fact, the women of a village had considerable influence if descent is matrilineal, when their importance is conclusive from the deference shown to them by the men.<sup>1</sup> Hence sons or daughters, would to some extent be affected by their mothers.

Werner notes that the wives had a role in the choice of a new chief, "and that often the customary order of succession among the Yao tribe was set aside,"<sup>2</sup> by the influence of the women in the election. As both wives and freed slaves had a personal interest in the appointment of a successor, it was only just that they should have a chance to express their objections, although their status was lower than that of free men. The headman in matrilineal societies also depended on a considerable and influential support from the women. Among the Yao where descent is matrilineal, a woman wields more power over her immediate family than the male, including her husband who left his

---

1. Stannus, Notes on the Tribes of British Central Africa, p.296.

2. Werner, A., Races of British Central Africa, op.cit., 1906, pp.259-60.

own village to join her. Her status is also that enjoyed by the eldest male of her family, i.e. her uncle or brother. And if there be no surviving male then she could safely assume full power and this could even be to the extent of assuming chieftainship.

The importance of women was again noticed among the Makololo women. Among them a woman might reject the decision of her husband or father, as was done by Subutuane's daughter who resigned the throne assigned to her by her father in order to get a proper marriage, as her father was averse to the idea of her marrying, as it would mean that she would forfeit her throne to her husband.<sup>1</sup>

Women were also known to be active in customary medicine. But here they had to be senior women in the community. They also advised the young women on health matters and the training of children.<sup>2</sup>

The husband was looked on as a father of his wife and children. As in the case of a father, he might strike his wife as disciplinary action, and this was not to be taken as an assault on her. Any action taken by her against her husband would not be considered by the Ankhoswe unless it was a serious physical injury. But any action short of

---

1. Livingstone, David & Charles, The Zambezi and its Tributaries, p. 225.

2. Read, M., The Angoni of Nyasaland, op.cit., pp. 134-5.



disciplinary measures was taken to be against customary law.<sup>1</sup> This, if done by an outsider, was a criminal offence.<sup>2</sup>

Further evidence of woman's privileges was shown by the fact that she could barter a small part of her grain at any time, without asking for her husband's permission, but she could not give gifts to her relatives without the consent of her husband. If a husband found any goods, he had to ask his wife to make enquiries about their ownership. If the owner could not be found and he wished to barter, then he could not do so without his wife's permission.<sup>3</sup> The reason why the wife had to make enquiries about the ownership of the goods was because it was considered too menial a task for a man, and they were usually in her possession. In regard to her right to barter any small household article without the husband's permission, this would seem to come close to the position as regards joint ownership between spouses of property in English law - as it was propounded in *Jones v. Maynard*.

---

1. Interview with R. Katengeza.

2. Heckel, Benno, The Yao Tribe, op. cit., p. 22.

3. Interview with R. Katengeza. See also Heckel, Benno, The Yao Tribe, p. 36

## Infants

In Malawi societies children are the pride of the tribes. Among the matrilineal tribes, daughters not only have a material value, but also brought in adherents to the maternal village in the form of sons-in-law. The patrilineal tribes who accepted bride price also welcomed female children as they brought "wealth" to the parents.

Most Europeans thought that children left on their own with little or no supervision must be sadly neglected. On the contrary, in Malawi homes other siblings and relatives exercised some influence on the young. Although there were no schools to confine them to desks, they learnt their duties and picked up a great deal of information, by imitation, asking father, mother or uncles; but above all, children acquired what skills they needed at their own discretion. The main educational and religious emphasis in the child's upbringing at this stage was "respect" and "social awareness". There was a fixed code of acceptable behaviour.<sup>1</sup> Physical strength, courage and attention to detail was very much enforced.

Parents had great patience with their children. Macdonald in 1882 noted that "there are no clothes to soil, no house to spoil, no windows to smash, no dishes to break, no spoons to lose, the child may play with anything it can

---

1. Macdonald, Duff, Africena, Vol. 1, op.cit., p. 120

find; it may go where it likes without going into much danger, and without destroying flower beds or favourite plants."<sup>1</sup> Parents had great love for their children, and this love is often shown by the freedom given to a child in not being over-controlled.<sup>2</sup>

Yet the Yao parents do not indulge their children, and if they were caught pilfering a second time, they were severely punished. Heckel said of the Yao children, "the wretched sinner is taken by his left arm and his hand is held over a fire or put in hot ash."<sup>3</sup>

Under customary law the child is not trained by being beaten as a normal form of disciplinary measure; and hence beating a child is wrong under Malawi custom, except in cases of persistent delinquency. This depended very much on the age of the child concerned, and also on the type of wrong the child had committed, and hence there were certain wrongs which might not be punished by the mother; for example, theft is punished by the father and very grave cases are punishable by the court.<sup>4</sup> But in the latter case, it is vicarious liability, and answerable by the parents.

---

1. Macdonald, Duff, Africana, Vol. 1, op.cit., p. 120.

2. Duff, H.L., Nyasaland under the Foreign Office, pp.234-5.

3. Heckel, Benno, The Yao Tribe, op.cit., p. 16.

4. Rangley, W.H.J., "Notes on Chewa Tribal Law", Nyasaland Journal, Vol. I, No. NO3, 1948, p. 15.

The reason why certain cases are punished by the father is because in most cases certain children, especially boys, paid very little attention to the mother's punishment.

In addition if a baby cried continually, and the mother paid no attention, the mother might be beaten by any member of the community; and such a member was not answerable for his acts. This depended very much on the age of the child.

The statement by Heckel that the child's hand was put into hot ash should be qualified. Punishment of this nature was given to a child who was a habitual wrongdoer, and especially when he got into the habit of stealing things in the house and/or outside, so that the child's right hand might be put into hot ash, so that the child was unable to use his hand again.<sup>1</sup> Hence Heckel's statement, in regard to the left hand being put in the ash, is not usually the case, unless the child is left-handed. The right hand was often punished in such cases.<sup>2</sup>

As stated above, initiation is a very important educational institution among certain tribes such as the Yao, Nyanja and Lomwe, and the initiation ceremonies take place at various intervals.

Initiation takes place at four distinct phases

- 
1. Rangeley, W.H.J., "Notes on Chewa Tribal Law", op.cit., p. 15.
  2. Stannus, H.S., "Notes on Tribes of British Central Africa", in Royal Anthropological Institute Journal 1910, p. 310.

in a girl's life, whereas it is merely three in that of a boy. The first one among the boys is that of circumcision, which is carried out on them when they are between nine and twelve, or fourteen and fifteen when they attain puberty. Apart from the circumcision itself, the boys are told many things which would guide them in their lives and in their dealings with other people.<sup>1</sup> In addition they are taught hymns and songs of their tribes, observation of the sky, stars and winds, dances, games, and the importance of human life.

Initiation of girls also takes place at about the same age, and instructions as to how to conduct themselves in the society are given by old women. "Chinanmwali" is a second ceremony for the girls on the occasion of their reaching puberty and when they are ready to get married.<sup>2</sup> Accordingly, instructions pivot round the occasion and the girls in this second ceremony receive advice as to the nature of marriage and as to how to select their future spouses.<sup>3</sup>

The next ceremony for both girls and boys takes place on the event of marriage when it becomes a joint affair and instructions and advice are given to both groom

---

1. Heckel, Benno, The Yao Tribe, op.cit., p. 23.

2. Stannus, H.S., "Notes on Tribes of British Central Africa", 1910, p. 297.

3. Heckel, Benno, The Yao Tribe, op.cit., p. 23.

and bride together. The final ceremony is given just before the first baby is born and instructions given at this ceremony consequently deal mainly with their behaviour towards each other, and how to look after the baby. Regarding this last ceremony, unmarried people are not allowed to attend it.<sup>1</sup>

While the Yao, Lomwe and Nyanja children were undergoing initiation ceremonies, the headman of the ceremony (not village headman) or headwoman was responsible for any wrong the child might have committed at the ceremony.<sup>2</sup> But the chances of committing any wrongs were remote as the children were at this time under strong control of the headman, or headwoman, as the case may be. Again at this time, the children were so isolated from the community, that any possibility of their committing wrongs rarely arose.

Although children at a certain age went to the dormitory where they slept with other boys and girls, with girls their parents' liability did not cease. This responsibility, however, depended on the child's age. Hence although some children continued to sleep at the dormitory they were themselves liable if they were old enough to answer for their wrongs.<sup>3</sup>

---

1. Interview, Che Somanje.

2. Ibid.

3. Interview, Chief Chakhumbila.

Among some tribes such as Ngonde and Lomwe the boys and girls had a group leader while at the dormitory who was liable for their wrongs.<sup>1</sup> But he could not answer for them if the wrongs were of a serious nature, such as murder, where their parents were again vicariously liable. The age-group leaders also acted as intermediary in arranging boy and girl friendships which often ended in marriage. However, final marriage arrangements were made by the boy's parents.

The children's relationships also extended to their parents; thus it was a strong uniting force between parents of the children who slept in the same dormitory. And it often happened that in such dormitories boys were introduced to their future wives by their future brothers-in-law. In these dormitories responsibility between brothers was strengthened, as in cases of disputes brothers defended each other against an outsider.

Malawi customary law seemed to come near to English law in exempting children from liability. Among these tribes a child was "opanda nzeru" (incapable of committing crimes). It was also applicable to a lunatic - "otha nzeru" (without understanding), and if he was taken to court, no lipo (fine) was payable. Although children were exempted from liability, if a child inflicted death

---

1. Interview, Mwekasungula and Che Somanje.

on another, the child's relatives, regardless of its age, were called upon to pay compensation.<sup>1</sup> This was vicarious liability, which was at the discretion of the Court. This was similar to the rebuttable presumption in English law regarding children's liability between the ages of ten and fourteen.<sup>2</sup> But the Ngoni child was responsible for its wrongs<sup>3</sup>, provided the child knew what it was doing.

Ngoni children were the children of their fathers from birth<sup>4</sup>; in case of a divorce, the father or his family had custody of the children. This is in contrast to the children in a matrilineal society where the child belongs to the mother; in case of a divorce it remains with the wife's relations. Ngoni boys went to sleep in a dormitory from the time they had their second set of teeth<sup>5</sup> and stayed on there until they married, unless they were taken to "Impi".<sup>6</sup> When living in these dormitories, before they went to herd cattle, they made friends and acquired qualities of self-defence and reliance, much needed later in life.

---

1. Rangeley, W.H.J., "Notes on the Chewa Tribal Law", op. cit., p. 16.

2. Children and Young Persons Act, 1963, Section 16.

3. Read, M., Children of their Fathers, Methuen & Co. Ltd., 1959, p. 129.

4. Ibid., pp. 72-3.

5. Ibid., p. 87.

6. Interview, Chief Chakhumbila.



Missions tried to separate the baptised boys from the rest and they met with great resistance.

### Aliens

Under customary law, aliens were assimilated to a community as soon as they were accepted by the chief of that area.<sup>1</sup> Gamitto remarked that the hospitality of the people of Malawi to aliens was often recognised by customary law so that their goods and they themselves were legally protected and had access to the courts of the area.<sup>2</sup>

Once aliens were assimilated into these communities, they were granted all the rights which were also granted to the members of the community, but they were expected to perform communal duties.

The actual acceptance of the alien into the community was done by the chief if permanent residence was required.<sup>3</sup> But any member of the community could receive an alien and the alien could expect hospitality from the member of the community without the chief's consent, provided

---

1. Livingstone, David & Charles, The Zambezi and its Tributaries, op.cit., p. 224.

2. Gamitto, A.P.C., King Kazembe, op.cit. (trans. by G. Cunnison) Vol. I, pp. 99-100.

3. Livingstone, David & Charles, The Zambezi and its Tributaries, op.cit., p. 224.

the visit was temporary.<sup>1</sup>

Unlike under British administration, it was not necessary for an alien who desired to settle in a Malawi community to state the reasons for his visit and the duration of his stay there.<sup>2</sup>

Because of the acceptance of the alien by the chief, the alien was entitled to be given a plot of land by the chief to be used by him in the same way as any other member of the community, but he could not be made owner of the land as the land belonged to the tribe.<sup>3</sup>

Because of the constant movement of the communities in Malawi during the early days of the British administration, due to tribal wars, it would appear that the rules regarding the acceptance of aliens into the communities were not as strictly observed as in normal peace times. It was on this ground perhaps that Macdonald stated that everywhere aliens were received "with hospitality by any member of the community",<sup>4</sup> not necessarily a chief. However, by 1903, no stranger could be received in any community

---

1. Macdonald, Duff, Africana, Vol.I, op.cit., p.27.

2. See Chapter 5, Part II of this thesis under Duties of Principal Headman to report of new arrivals in his area, The District (Native) Administration Ordinance 1912.

3. Macdonald, Duff, Africana, Vol.I, op.cit., p.177.

4. Ibid., p.27.

without the concurrent consent of the chief and the Collectors.<sup>1</sup>

It was not until 1912 when this matter was finally taken over from the hereditary chief to the Principal Headman under the District (Native) Ordinance, 1912.

### Slaves

No discussion of legal persons in any society can be complete without touching on the status of slaves. Frequent inter-tribal wars due to local jealousies, partly the effect of migration of tribes, as well as the insidious practice of the Arab slave traders led to commercial slavery in Malawi society.

In societies where slavery was an institution, it frequently arose from being born of slave parents, either a slave mother or a free father. However, the latter case would seldom occur in Nyasaland because in Nyasa society, the mother who was a slave automatically became a junior wife and her child a free citizen.

Roman law was clearly on a similar footing here, but the position differed in Roman society, in that the child of a slave mother and a free father was legitimized in the following ways:

---

1. Duff, H.L., Nyasaland under the Foreign Office, op.cit., p. 289.

- (a) by subsequent marriage. This method was introduced by Constantine and Justinian sanctioned it, subject to these conditions:
- i) Parents must have been legally capable of marriage when the child was conceived;
  - ii) A proper marriage contract must be drawn up;
  - iii) The child must consent.
- (b) by Imperial Rescript. Where subsequent marriage was impossible (e.g., because the mother had since died), Justinian, in some cases, permitted legitimation by rescript.
- (c) by offering to a Municipal Council. Legitimation was allowed if a natural son was made - or a natural daughter married to - a member of a Municipal Council.

In the case of a child born to a slave father, the child - in Malawi law as well as in Roman law - belonged to the master of the slave father.<sup>1</sup> It is interesting to note the difference and also the position of a slave in some Malawi societies and that of Roman society; prima facie, as in Roman law, the master had the power of life and death over the slaves. But among the Yao on the other

---

1. Justinian Digest.

hand, if a man killed his own slave, the moral power of the Chirope existed for punishing the cruel master, who from then onwards would be haunted by the spirit of his ancestors for wrongfully killing his own slave.<sup>1</sup> This right was seldom exercised by any sober master. Although slaves were beaten and placed in the "gori" stick (slave stick), they could not be killed without justification, except at their master's funeral.<sup>2</sup> In that case, however, they were not killed by the master, but it was the custom that some slaves should be buried alive with the master, especially among the Yao; but some were buried dead.

Werner states that they were often kindly treated, and in fact, to an outsider, were often indistinguishable from the family.<sup>3</sup> Rowley explains that their position could hardly be distinguished from the free people as they all engaged in the same occupation.<sup>4</sup>

The outstanding humanitarian feature of slavery is seen from the fact that the master addressed his slaves as "mnyamata" (boy) or "bambo" (father) rather than "kepo<sup>l</sup>ko" (slave). A girl was addressed as "namwali" (girl) or "mai"

---

1. Werner, A., The Native Races of British Central Africa, op.cit., pp. 67-8.

2. Ibid., p. 160.

3. Ibid., p. 160.

4. Rowley, H., Twenty Years in Central Africa, p. 18.

(mother).<sup>1</sup> The similarity between slavery in both Malawi and European societies lay in the fact that slaves performed household chores and field-work without payment; but here ends the similarity, because in Malawi society, the female slaves were often the master's junior wives<sup>2</sup>, as stated above.

Among the Chewa, the owner often married his male slaves to his female relatives as this excluded him from paying bride-price, and, of course, female slaves were often married by the owner.<sup>3</sup>

People who were condemned as criminals or bewitchers or debtors acquired the status of slavery until they were redeemed. During famine, sometimes people placed themselves into slavery in order to have food from the richer. Sometimes they did so when they had no relations living.<sup>4</sup> They also did so in order to protect themselves from the constant attacks of stronger tribes. The Ngoni raided other tribes in order to supplement their manpower by incorporating people from the raided tribes into their

---

1. Werner, A., The Native Races of British Central Africa, op.cit., p. 273.

2. Macdonald, Duff, Africana, Vol. I, op.cit., pp. 140-1.

3. Ibid., p. 140.

4. Livingstone, David & Charles, The Zambezi and its Tributaries, op.cit., p. 49.

own tribal structure.<sup>1</sup>

The Tonga never integrated their slaves into their family structures; this is a devastating contrast to all other tribes in Malawi. The Tonga kept their slaves in segregation, a sort of slave apartheid. The slaves were allowed to maintain their own kin-groups if they had any, if not, they could create one to suit themselves. In a way, this system suited the slaves as they were able to retain their own identity.<sup>2</sup> But had its disadvantages as they could never rise above the status of a slave. It was this system which prevented marriages between slaves and free men, among the Tonga.

Slaves acquired because they were in debt could hardly be called slaves as their status was on condition that the debt could be satisfied and they redeemed. Today, people from such transactions are regarded as distant cousins of the family to whom they were pawned.<sup>3</sup> A slave could change his master by running away to another village

- 
1. Duff, H.L., Nyasaland under the Foreign Office, op.cit., p. 196.
  2. Van Velsen, J., The Politics of Kinship, op.cit., p. 52.
  3. This situation exists in a village near Zomba where two families whose relations were unable to ransom then remained in the village, and when slavery was abolished they were accepted as members of that community and known as cousins.

where he would be claimed as a slave by a relation of his master or where he was inherited after the death of his master. In the former case he may do so with the hope that the second master may be kind to him. The custom was for the slave to go to the village of his choice and sit by the site of the house which had been pulled down after the death of the occupant. He could also run away and throw himself on the grave of a neighbouring chief. In this way he came under the protection of the chief's family.<sup>1</sup>

The treatment given to such a slave was more lenient than otherwise, as to maltreat him would anger the dead occupant's spirit.<sup>2</sup> Judgement debtors were called Dindile among the Chewa. They were so kept in order to allow their relations to find enough property to pay out his debts.<sup>3</sup>

Slaves were not only sold but bartered.

Slaves were sacrificed at the death of a Yao chief, but only within certain clans. The master's death was kept secret until the required number had been secured in slave sticks. Werner explains the method adopted as follows:

"They were then strangled at the graveside and thrown in before the master's body was lowered. Sometimes they were buried alive and this was done till recently by the Tonga, who, if one

- 
1. Johnson, P.W. Nyasa the Great Water, op.cit., p.29.
  2. Rangeley, W.H.J., "Notes on the Chewa Tribal Law", op.cit., pp.63-4.
  3. Ibid., pp.63-4.



slave was buried with a chief, made him lie in the grave, clasping the dead man in his arms. If there were several, they sat in the grave facing each other and the corpse was laid across their knees. If any of them sneezed after taking his place in the grave, his life was spared, as it was believed that the spirit thus signified his refusal of that particular victim." <sup>1</sup>

It was said of the Bemba that the slaves so sacrificed died willingly. But it is not known whether Malawi slaves submitted to this voluntarily.

When a slave became an important man through his acts in the village, he could be made an adviser to his master and chief. Especially so in matters regarding the slave's own people, e.g., a Nyanja slave among the Yao; he became an important person in foreign disputes, but this did not entitle him to his freedom.

Buchanan mentions instances where a man could, due to his failure to meet an obligation in a law suit, sink down into slavery, and likewise a man who for a very long time remained a slave could rise to a very powerful status, especially when he was redeemed by his people where he immediately took the position he was entitled to. <sup>2</sup>

A slave might own property which he inherited from his master at his death. A slave could only inherit property if there were no other persons in the line of

---

1. Werner, A., The Native Races of British Central Africa, p. 160.

2. Buchanan, John, The Shire Highlands, op.cit., p. 97.

succession. But sometimes a slave was preferred to a right person in the line of succession if it was the master's instruction. He may not, however, marry the master's widow against her will, but in this case, the slave may take up any action against her to the Makambala (i.e. nobleman). In rare cases (the Ngonde) the popularity of the slave with the master's family may lead to his being accepted as a member of the family and may have access to the wife of the master in cases of impotency on the part of the master.<sup>1</sup> Slaves might even own other slaves left by the dead master and would later enter into legal marriages occasionally with the master's daughter, if the master authorised it.

In Chewa law, a slave could sue at law and be sued. A slave could receive "lipo" for an injury, if, for instance, a free man, or even a chief, committed adultery with his wife. The slave could receive a "lipo" of even slaves and thus become himself a slave owner and perhaps buy his freedom. Rangeley observed that a slave could even receive "dziko"<sup>2</sup>, i.e. land, which meant chieftainship. It would seem, however, that the word "dziko" is wrongly referred to here, as "dziko" always means "country" and not a portion of land as it is construed here, which could be accurately described as "malo a dziko".

---

1. Interview with Mwakasungula.

2. Rangeley, W.H.J.: "Notes on the Chewa Tribal Law", op. cit., p. 65.

If a slave received a gift of a portion of land with people he thereby became the headman "mfumu", but he could never receive a country of "dziko", as referred to above. Some existing headmen have been created in this way.<sup>1</sup> But such instances would only take place where the people on that land were also slaves, as no free people could be under a slave.

It might be argued from the foregoing that slavery of a nature as known to other nations, did not exist in Malawi, because it was not as rigid as it was in other countries and in practice, slaves were not ashamed to be so, as it was understood that a man became a slave not through heredity, but merely by being a victim of circumstances, i.e., when he was captured; and only he, and not his family, became a slave. Again in the case of a slave who was something in the nature of a pawn, became redeemed once the debt was cleared. In addition the condition of the slave depended not on the law but on the master's feelings towards him. Thus he could be integrated in the family. Again, the Malawi slave had not only duties, as did other slaves of other nations, but rights at law - he could sue in the Chewa law and he paid "lipo" if another person, be he slave or a free man, committed adultery with his wife. Among the Ngonde, he could marry his master's widow on his master's instructions and with her consent.<sup>2</sup>

David Livingstone talks of Makololo servants, but there does not seem to be any evidence that among Malawi tribes

1. Interview - Chief W. Gomani.

2. Interview - Mwakasungula.

there existed servant-master relationships. Perhaps this statement is made in connection with the captured people who worked as servants or slaves during the time of Livingstone.<sup>1</sup>

According to some early writers on Malawi, slavery did exist among the Malawi societies but its nature was not as degrading as that of the slaves of European societies. Rowley explained their status in the following quotation:

"Throughout Central and East Africa, slavery is an institution which exists among the natives themselves. Among these tribes, however, with whom we became acquainted, slavery was far less degrading than among the Portuguese. It was difficult to distinguish between the bound and the free, for all lived together and followed the same occupations." 2

Other writers such as H.H. Johnston give the impression that the Malawi chiefs kept many African slaves to themselves and that such a situation continued until the British Government in the then Nyasaland under Johnston's Consularship declared that the slaves were free to go where they pleased, provided they observed the Law.<sup>3</sup>

It is not explained whether these chiefs kept slaves as of custom and thus rendered slavery a recognised institution among the Malawi tribes or whether it was a foreign institution in that they only acquired them in raids and kept them as prisoners of war.<sup>4</sup> Johnston in addition stated that the slaves from the Senega and Bisa countries in the Luangwa valley and from Southern Nyasaland were taken by the Portuguese to Tete

1. Livingstone, David & Charles, The Zambesi and its Tributaries, op.cit., p.304.

2. Rowley, H., Twenty Years in Central Africa, op.cit., p.18.

3. JOHNSTON, H.H., British Central Africa, op.cit., p.158.

4. Livingstone, David & Charles, The Zambezi and its Tributaries, op.cit., p.226.

on the Zambezi and thence the Quelimane and Mozambique where they were picked up by American ships as late as the beginning of the sixties.<sup>1</sup>

Transactions of this nature as quoted above could hardly be called domestic transactions. The ordinary Malawi chief had no contacts in far away places such as Tete which was in Portuguese East Africa or America where slaves were finally dispatched. The constant tribal wars made it impossible for Malawi chiefs to organise a large-scale transaction with traders from the outside world; above all their slave trade knowledge did not equal that of the Yao and Arabs, the only group which transported slaves outside Malawi.<sup>2</sup>

The only organised slave trade known to Malawi chiefs by 1861 was that led by Yao chiefs who constantly sold captured people from other tribes to Arabs as slaves in return for calico, beads and above all guns which they used in wars against the Nyanja, Makololo and other weaker tribes. It was in this state of affairs that missionaries such as Livingstone, Bishop MacKenzie and H. Rowley found themselves.<sup>3</sup>

There has been no written evidence by the Malawi people supporting writers such as Rowley in stating that slavery was an institution among the Malawi tribes. And although it has been stated that certain tribes sacrificed their slaves at the funeral of the master, it seemed to be a custom used for some time by Malawi chiefs, and it could be argued that the

1. Johnston, H.H., British Central Africa, op.cit., p.156.
2. Swann, Alfred J., Fighting the Slave Hunters in Central Africa, Seeley & Co. Ltd., 1910, p.62.
3. Rowley, H., Twenty Years in British Central Africa, op.cit., p.55.

system of sacrificing slaves may have been introduced only after the introduction of slavery by foreigners; and that if it existed before the introduction of slavery, they used animals such as the ox which was sometimes done among Yao chiefs.<sup>1</sup>

But among the many reasons for asserting that slavery did exist in Malawi societies, at least for domestic purposes, was the fact that there were constant tribal wars resulting in the defeated tribes' becoming prisoners of war who were in fact treated as slaves of the victorious tribes.<sup>2</sup>

However, it can be argued that slavery as one involving commercial transaction on a large scale was not known; but that as a domestic institution it was practised is evidenced in the Malawi word "Kapolo".

### Lunatics

Cases of lunacy existed in Malawi communities. There was however no legal provision made under Malawi customary law for their special confinement as was later under the administration of English law in Malawi, due to the fact that a lunatic would usually be in the special care of his relatives or, if without relatives, the chief might ask the other members of the community to care for him for the sake of human charity.<sup>3</sup> In addition the lunatic under customary law though not confined in an asylum, usually had to be in a gyi-stick which proclaimed him as an insane man to the community.<sup>4</sup>

1. Werner, A., The Native Races of British Central Africa, op.cit., 1906, p.160.

2. Livingstone, David & Charles, The Zambezi and its Tributaries, op.cit., p.226.

3. Interview with R. Katengeza.

4. Ibid.

This situation however came to an end with the passing of the Ordinance of the care of the Lunatics, when magistrates were given power to inquire into cases of alleged lunacy and to confine such people to a place suitable for such confinement.<sup>1</sup>

A lunatic was known under customary law as Otha Nzeru as distinguished from opanda <sup>n</sup>hzeru which means one born an idiot or a child of tender age. Both the lunatic and the idiot were exempted from the liability of paying compensations while the child's offences were vicariously answered for by the persons who stood in loco parentis to him.<sup>2</sup>

With the advent of the British Administration the lunatic in his asylum had better medical treatment than those in the days previous to it.

---

1. See Part II, Chapter VI under title Lunatics.

2. Langley, W.H.J. Notes On a Tribal Law, The Nyasland Journal Vol.1, No.3, 1948, p.16.

## CHAPTER II

After having discussed the status of the members of Malawi Societies it is now left to deal with the law which governed them.

### The law and classification of Wrongs

Various societies in the world have their own forms and patterns of punishment. In Malawi law punishment was a form of discipline; a deterrent to would-be wrongdoers and potential criminals. European scepticism to customary law was expressed by T.G. Wood's Natural History of Man: "The savage is essentially cruel, not having the least regard for the sufferings of others and inflicting the most frightful tortures with calm enjoyment. As for morality, as we understand the word, the true savage has no conception of it, and the scenes which rightly take place in savage lands, are of such a nature that travellers pass them over in discreet silence. Honesty in its right sense is equally unknown and so is truthfulness or successful theft and an undetected falsehood, being evidence of skill and ingenuity and by no means a disgrace."<sup>1</sup> Today, the

---

1. MacDonald, Duff, Africana Vol. 1, op. cit., p. 258 .  
Quoting T.G. Wood. Natural History of Man.



law of these people might appear barbarous to us but we must always bear in mind the age in which they lived.

All legal persons had an undisputed social status which the law expected them to maintain. There were no political parties or oppositions in the way we know them now, yet everyone was free to give his own opinion and the law protected him, provided that such criticisms did not affect the rights of other members in the community.

In villages, nobody was ever in want. MacDonald remarked on the generosity which the villagers showed towards each other in the matter of sharing and lending property.<sup>1</sup> Even in cases of famine travellers could enter a garden or a farm and help themselves to their satisfaction but were not allowed to take things away.<sup>2</sup>

This in fact, was why the punishment for theft was excruciating. There was no justifiable excuse for stealing. "A man who robs his neighbour", it is argued, "puts himself in the position of a wild beast, and deserves to be treated as such".<sup>3</sup>

---

1. MacDonald, Duff, Africana, Vol. I, p. 27.

2. Interview with R. Katenpeza.

3. Duff, H.L. Nyasaland Under Foreign Office, op. cit., p. 339 1903.

Hence the argument defeats Duff's assertion that "among primitive people, where the moral sense is exceptionally feeble, legislative retribution is of necessity exceptionally severe".<sup>1</sup>

In villages, society, duty, friendship and charity were greatly valued, that was why the law had to be maintained by measures which people would respect. Because of the tremendous penalty paid for crimes, there were no habitual criminals as such.

Inability to write, declared Duff, "eliminates at once all such ignoble swindles as are affected by an unscrupulous use of the pen". There are no accounts to be forged. "Native innocence guards against unnatural crimes. Thus, debarred from artificial sources of evil, the native confined himself to those fierce transgressions against life, liberty and property which, originating in the primitive passions of men, have stained and chequered the history of all tribes and nations."<sup>1</sup> Murder, battery, abduction, robbery, theft, these are the principal crimes which he recognises and all of them, like most other offences, he was wont to punish, according to his severe and simple code,

---

1. Ibid., p. 238.

by the supreme penalty of death".<sup>1</sup> This was so among the Yao but only compensation was not forthcoming.

Travellers and other writers have tried to distinguish between criminal and civil wrongs in Malawi society. It is necessary to state that unlike English law, where crimes are distinguished from civil wrongs, such distinction was not stressed in Malawi society. In addition, regarding procedure, they differ basically in that in English law crimes are punitive and at the instance of the Crown whereas civil wrongs are compensatory and at the instance of the aggrieved individual.<sup>2</sup> There was not often the tendency to divide wrongs into categories corresponding to civil and criminal classes.

In Malawi society, all the wrongs, whether civil or criminal, were all dealt with by the Chief, with some qualification among the Acewa.<sup>3</sup>

Among the Acewa "all wrongs were private wrongs, either against an individual or against the Chief as an individual in his capacity as the head of the community."

---

1. Ibid., p. 335.

2. Winfield, P.H., Winfield on Tort London, Sweet & Maxwell. 1963. pp. 10-11.

3. Werner, A., Native Races of British Central Africa, op. cit., p. 263.

A Chief could also as a private individual commit a wrong. If the Chief was wronged compensation was paid to him at first appearance as a private individual but when it is remembered that in fact the wealth of the Chief was the wealth of the people it is seen that in reality the payments were made to the Chieftainship and not to the Chief".<sup>1</sup> The punishment for all wrongs was compensation.

Imprisonment, as a form of punishment, was not known. This is because imprisonment instead of punishment is a form of slavery and a Chief could not keep a slave whose wrong was done to another individual and not to him, and who was the person meting out justice, unless such a slave was for the use of the community when he would appease the anger of the people - but this does not seem to have been the case among the Malawi people.

The more serious offences were murder, adultery and witchcraft.<sup>2</sup> One wonders whether in those cases where an offence against the community was recognised, one could not say that these were criminal offences. Moreover,

---

1. Rangeley, W.H.J., "Notes on Chewa Tribal Law." The Nyasaland Journal Vol. 1. No. 3. Nyasaland Society 1948 p. 7.

2. Duff, H.L., Nyasaland Under the Foreign Office, op. cit., p. 319.

since it is conceded that in those cases of disobedience of the Chief's orders, "war" on the Chief,<sup>1</sup> etc., where the lipo was paid to the Chief, it was really paid to the Chieftainship. And since it was conceded too that such lipo was paid into the Chief's treasury making it a sort of fine, could it not be said that offences of that sort were indeed offences against the community (represented by the Chief) for which fines had been imposed making them crimes? Perhaps it is merely academic trying to find a distinction between civil and criminal offences. It would certainly have been easier if one could follow Elias here and say that the differentiation is "between offences that must be publicly punished by society at large and those that should be left to private redress..."<sup>2</sup> In Acewa Society such a distinction was unfortunately not quite sharp. In serious offences such as murder and witchcraft the "punishment by the society at large" which would have been death or banishment was not automatic and often lipo (private redress) was resorted to. In Acewa law the recognised wrongs were clearly set out and included offences against the Chief, offences against Religion, offences

---

1. Rangeley, W.J.H. "Notes on Cewa Tribal Law", op. cit., p. 19.

2. Elias, T.O., Nature of African Customary Law, Manchester University Press. 1956. p. 121.

against Justice, offences against Public Peace, all which called for lipo to the Chief. Then, offences involving bodily injury, sexual offences, offences against property all of which involved the paying of lipo to individuals who were wronged. Of the Yao, Werner noted the division into criminal and civil wrongs, each group having its own procedure.<sup>1</sup> But it is necessary to state that such a distinction even among the Yao could only be noticed in grave cases; hence in petty crimes and some civil wrongs procedure could hardly be distinguished. Among recognised crimes were murder, adultery, patricide, offences against women.<sup>2</sup>

In those tribes where the classification was recognised different procedures were used in practice. As noted above, the Yao used different procedures. The Ngoni did not seem to have had more than one court procedure<sup>3</sup> and one wonders whether this indicates that they had no defined criminal and civil categories regarding offences.

- 
1. Werner, A., Native Races of British Central Africa.
  2. Duff, L.H., Nyasaland Under Foreign Office, op. cit., pp. 335-340.
  3. Read, M., The Angoni of Nyasaland, op. cit., p. 96.

Although Malawi society is somewhat reluctant to stress the difference regarding the categories of offences, one finds, by contrast with western procedure, certain distinct classes of wrongs. Such evidence was also found by Stannus, to be so among the Yao.<sup>1</sup>

## I. Crimes

Among the Yao homicide is a criminal offence, but there was no excusable homicide. The killer was called by the Chief<sup>2</sup> and was asked to pay compensation consisting of the following goods - five or eight cows, and sometimes a slave. The Chief kept some cows and the rest were given to the dead man's next of kin and relatives. The compensation given to the Chief is called "chi mwasi" - property stained by blood.<sup>3</sup> It would seem that the Chief received part of the goods not as compensation to him but as a form of punishment on the part of the killer for disturbing the community's peace under his Chieftainship. Hence the Chief received it as a

- 
1. Stannus, H.S. "Notes on Some tribes of British Central Africa", in the Royal Anthropological Institute Journal, Vol. XL. 1910. p. 290.
  2. Werner, A. Native Races of British Central Africa, op. cit., p. 263.
  3. Interview with Che Somanje and also Stannus, H.S. Notes on Some tribes of British Central Africa, op. cit., p. 290 (1910).

representative of the community.

If the killer did not possess property, but had run away, one of his relations might be taken as slaves by the Uncle, father or the brother of the dead man as the head of the family of the deceased. This would seem to be a form of pawnship, because those taken as slaves would be taken as slaves not as of right, but because the accused had no means to satisfy the required "lipo". They would be redeemed once the "lipo" was paid. In discussing this, Stannus has not touched on the point of the runaway killer. It would seem that his apprehension would not be essential, as in the case of the runaway killer it was not him who was to be punished if he was unable to pay the "lipo",<sup>1</sup> but his friends or relations.

Again, on the termination of litigation, to signify that the matter was closed and that friendship should prevail, it was the usual procedure to arrange a beer feast - the killer and his relatives being invited to sample the brew produced by the relations of the dead man.<sup>2</sup>

---

1. Werner, A., Native Races of British Central Africa, op. cit., p. 263.

2. Interview with R. Katengeza.



Although homicide is a crime according to English law, in Malawi law the final settlement in such a case is left to the individuals, i.e., that friendship should prevail as mentioned above. Such a settlement would only be done in English law if the matter had been a tort and not a crime.

Unlike English law, under Malawi law suicide does not constitute self-murder, but is a crime on the grounds that the particular citizen has deprived the community of his services and duties, especially his immediate family, that is, his wife, mother and children.

While suicides in England are denied church burial as they had destroyed "the temple of God" who had created them, this is not the case in Malawi society, where they are given the traditional burial, as the crime is considered as not one against themselves or God, but as against their immediate family, the community and their ancestors' spirits, who are never angry with the bodies of the suicides but only with them, while in the act of suicide, or in desiring it.

On being arrested the criminal was brought before the Chief's or the Headman's Court. If he was caught stealing by Malawi customary law, he could be killed on the spot. His death entailed no prosecution.<sup>1</sup> If caught alive he would be put into gori stick (slave stick) for safe keeping until ransomed by his relatives or friends. He is kept as a slave by the people wronged if no ransom was forthcoming. And this is one of the ways in which a man became a slave.

If a theft had been committed without suspicion falling on any particular person, the diviner was consulted; - the person pointed out by him was accused before the Court, after which the prosecution would demand the restitution of the stolen goods. If the defendant pleaded not guilty and offered to drink Mwavi to prove his innocence, his relations could demand the ordeal on his behalf. This method was not often practised by many social groups in Malawi, because the chances of escaping death in Mwavi trials was very remote and the defendant

---

1. Werner, A., Natives of British Central Africa, op. cit., p. 263.

therefore preferred to pay the value of whatever was stolen.<sup>1</sup> But where the theft was obvious, he confessed rather than risk his life in the ordeal. In this case he had to pay heavy compensation.<sup>2</sup> If he survived, the accusers had to pay a fine to him and the diviner is assumed to have made a mistake. Some try a second diviner, but he must not point out the man first acquitted as no man could be made to drink Mwavi twice on the same charge.<sup>3</sup> This system was so because Mwavi was the last appeal beyond human justice; hence, once he was found innocent by Mwavi his innocence could not be disputed.

Other ordeals were sometimes used besides the Mwavi such as plunging the hand into hot water or touching red-hot iron, but the principle was the same; injury to the hand proved guilt.<sup>4</sup> A Headman was held responsible for thefts committed by his villagers. He was sometimes

---

1. Ibid., 263.

2. Duff, L.H., Nyasaland Under Foreign Office, op. cit., p. 339.

3. MacDonald, Duff. Africana. Vol. 1, op. cit., p. 162.

4. Stannus, H.S., Notes on Some tribes of British Central Africa, 1910, op. cit., p. 305.

suspected of receiving the stolen goods once the accused was found in his village. If he refused to consider the matter when it was brought to his notice, the Headman himself was held responsible.<sup>1</sup> He was presumed to have been a party to the crime as it was committed in his village.

Although in some cases of murder no distinction was made between accidental homicide and murder, the instrument which had been the cause of the accident was seized instead of the owner and held until he paid several slaves for it, thus making it accidental death.<sup>2</sup> Sometimes the view was taken that the man or his instrument may have been bewitched and steps were taken to find out and punish the person who did it and also to prevent the instrument from being used on other victims. The man who killed his own slave or even his younger brother, or other ward was not amenable to justice. Elder brothers were expected to take care of their younger brothers and their slaves, hence death caused by them as a disciplinary

---

1. Werner, A., Native Races of British Central Africa, op. cit., p. 262.

2. Interview with Chief Chakhumbila.

measure, was not a crime provided it was accidental. But unless he protected himself by a charm he would be afraid of the mysterious chiropo which overtakes those who shed blood within the tribe.<sup>1</sup> The Chief to whom he went if he committed such a murder, procured the charm for him from his own medicine man and used it himself as well 'because of the blood that has been shed in his land.'<sup>2</sup> Duff pointed out that English law recognised serious provocation as extenuating circumstances, whereas Malawi law regarded it as complete exculpation so that the difference after all is only a question of degree. Among petty crimes could be listed the following:-

- I. Burning neighbour's house or his crops.
- II. Trespass with intent to injure.
- III. Causing a public fire.
- IV. Abuse of another's character (defamation).<sup>3</sup>

It will be noted that the four listed wrongs are wrongs which are done deliberately to destroy other people's property. During this period property was not protected

- 
- 1. Werner, A., Native Races of British Central Africa, op. cit., p. 265.
  - 2. Interview with Che Somanje.
  - 3. Duff, H.L., Nyasaland Under Foreign Office, p. 340.

by advanced methods; hence people were expected to be honest with each other's property, and therefore to be dishonest entailed heavy punishment.<sup>1</sup> In addition, the proximity of communal life created a relationship similar to kinship, hence to abuse each other's property and character was contrary to this code of behaviour.

### Burglary

Unlike petty theft, crimes like burglary and housebreaking were not as often as one would expect, in spite of the fact that the African houses are not often locked up and that anything in them can easily be taken. People left their doors often open as there was a belief that a man found stealing is in the position of a baboon, hyaena, or hog, etc. and is liable to be killed as any of these animals.<sup>2</sup> Robbery with violence was not nearly so prevalent as it was before the establishment of English settlements. This offence originated as highway robbery by the African porters (Antenga-tenga) who were employed to carry European goods from one station to another and

---

1. Ibid., p. 339.

2. MacDonald, Duff. Africana. Vol. 1, p. 183. Quoting Buchanan of Zomba.

who slept unarmed at night in open places, were peculiarly vulnerable to be robbed in this manner.<sup>1</sup>

In addition to the above reasons for robbery with violence, it is necessary to state that crimes with violence would have been practised during tribal wars where people were captured and their property robbed, and people so robbed although prisoners of war were treated as slaves but the victorious tribe did not consider it as robbing when they took the goods of the captured tribe.<sup>2</sup> In these wars the victorious groups considered it their right to confiscate their goods. However the statement by Duff is limited to African porters who worked for Europeans and this small class of Africans, i.e., European porters, could hardly represent the criminal tendencies of the Malawi social groups before the Malawi societies became so complex as would have been the case around the time of Duff L.H. Thus, except in cases of tribal wars the crime of robbery with violence was beyond the imagination of the simple tribal communities. Again as stated by Duff things were plentiful in tribal communities

---

1. Duff, L.H., Nyasaland Under Foreign Office, op. cit., p. 340.

2. Livingston David and Charles. The Zambezi and its tributaries, op. cit., p. 226.

and hence any person who robbed another put himself in a position of an animal and was treated as such.<sup>1</sup>

### Drunkenness

Drunkenness in itself was not a crime but even in this case only adults were allowed to drink beer because in their case it was expected that they would not misbehave or do any harm to other people in the community.<sup>2</sup> Young people i.e. infants, were not allowed to drink. It was not an excuse to say that he would not get drunk or that if drunk, would not misbehave.<sup>3</sup> But once found drunk, not only was the drunkard brought to trial, but even the brewer. He had to say why his beer made people drunk and made them misbehave so violently. Often the brewer pleaded that his beer was bewitched and the drunkard in this case pleaded that he was therefore poisoned by the bewitched beer.<sup>4</sup>

Among the Yao it was only old people's prerogative

- 
1. Duff, L.H., Nyasaland Under Foreign Office, op. cit., p. 339.
  2. MacDonald, Duff. Africana. Vol. I, op. cit., p. 173.
  3. Interview with Che Lubani.
  4. Ibid.



to get drunk, therefore there was no drunkenness among the young. If a young man was caught drunk, the beer seller was also brought for trial.<sup>1</sup>

Cases relating to Women - Cases of rape and seduction of women took place so often that, they were more than other cases.<sup>2</sup> These are discussed in various sections of this work.

Adultery - Among the Malawi people adultery was considered a grave crime, especially if committed by a wife.<sup>3</sup> In this case, she may be divorced by her husband as such conduct constitutes one of the grounds for divorce. He was also entitled to recover his bride price if he came from a community where bride price was paid.<sup>4</sup> Slave wives, who were termed junior wives, were not tried in the same manner as the free wives, and could freely be sold by the husband, as a form of punishment once adultery was proved.<sup>5</sup> Among the Yao punishment for adultery was

- 
1. Interview with Chief Kuntaja.
  2. Duff, H.L., Nyasaland Under Foreign Office, op. cit., pp. 340-1.
  3. Werner, A., Native Races of British Central Africa, op. cit., p. 265.
  4. Van Velsen, J., The Politics of Kinship, op. cit., p. 98.
  5. Werner, A., Native Races in British Central Africa, op. cit., p. 266.

by death or mutilation and was often carried out in the case involving a Chief's wife. The Yao Chiefs Mponda and Malemia went a step further, and carried out such punishment even in cases where the wife was merely suspected of the crime.<sup>1</sup>

Before the 1911 Witchcraft Ordinance, which abolished the practice of witchcraft, people accused and guilty of witchcraft were burnt alive. However, this was only when Mwavi was not given to him<sup>2</sup> or he refused it. Such incidents where witches were burnt, were witnessed by W.P. Johnson of University Mission to Central Africa at Likoma.<sup>3</sup> Women if found guilty of practicing witchcraft was not exempted from similar punishment of male witches.

When a sorcerer died, whether man or woman, no mercy was shown to him<sup>4</sup> especially when he was considered a burden to the community.

- 
1. Interview with Chief Mponda.
  2. Buchanan, John, The Shire Highlands, William Blackwood & Sons, London 1885, p. 138.
  3. Johnson, W.P., Nyasa the Great Water, Oxford University Press, 1922, p. 123.
  4. Buchanan, John, The Shire Highlands, op. cit., p. 138.

It would appear that among the Makololo it was very unusual that a witch was burnt alive before taking mwavi ordeal.<sup>1</sup> A man was considered guilty when he refused to take mwavi. Among the Manganja every death was deemed to have been brought by some witchcraft either on his own account or having been asked to do so by some enemy in the village.<sup>2</sup> Thus it is not surprising that a witch's death was a relief to the community, as he was the instrument which caused death in many cases, either because he wished to do but mostly because he was asked to do so.

It is stated that there was no case against a man who seduced an unbetrothed girl. The latter was considered at fault.

It is not clearly stated why the unbetrothed girl should always be at fault in such cases.<sup>3</sup> The reasons for such an attitude would seem to be on the grounds that the unbetrothed girl allowed herself to be too free with a strange man. Such an incident could seldom happen

- 
1. Livingstone, David and Charles, Zambezi and its Tributaries, p. 120.
  2. Roweley, H., Twenty years in Central Africa, p. 35.
  3. Interview with Che Sananje.

to betrothed girls as they were under control of the man to whom they were betrothed and if she was too young she would be under the control of her parents. MacDonald calls this a case of adultery.<sup>1</sup>

In addition, it should be stated that crimes of this nature seldom took place except when villagers were captured by enemies.

Unnatural offences such as Lesbianism and sodomy appear to be unknown to Malawi societies.<sup>2</sup>

Stannus talks of rape amongst the Yao as a crime but whether it ever occurred is doubtful. This is attributable to the innate modesty of the women and therefore, evidence of such a crime would be hard to find. But according to Stannus, punishment for such a crime was by drowning, the offender was bound, stones attached to him and thrown into the river.<sup>3</sup> The idea of the crime of rape would seem to be more of an importation than an indigenous customary practice. Also in a polygamous society rape would seem to be remote as a man usually has

- 
1. MacDonald, Duff, Africana, Vol. I, op. cit., p. 173.
  2. Stannus, "Notes on the Tribes of British Central Africa" 1910, p. 290, op. cit.
  3. Ibid., p. 290.

many wives and the chances are that he has too many problems already at home.

In addition, Stannus talks of seduction as a crime among the Yao. As in rape, one wonders whether such a crime occurred at all because women were not allowed to talk to strangers and as a result no opportunities arose for such an illicit relationship.

It is possible, however, that by 1910 when Stannus conducted his research some women were emancipated and working in towns. The chances were that they could speak to strange men.

There are two kinds of seduction according to Stannus:-

(1) In the case of a woman who is not a virgin if a man induced such a person to run away with him to another village, he became the slave of the brother of the village Headman.<sup>1</sup>

(2) In the case of seducing a virgin a man paid the equivalent of £2, unless he marries her immediately.<sup>2</sup> £2 in those days would be equivalent to a substantial amount

---

1. Ibid., p. 290.

2. Ibid., p. 290.

of property. It seems a Chief preferred such an offender to marry the girl as her chances of marrying a reliable man were remote, for after such an incident she was considered an unchaste girl; more so, as every woman was examined to prove that she was a virgin before marriage took place.<sup>1</sup> These were often grounds for breaking off an engagement. This practice was much stronger among the Henga of the North Province where such a practice still exists today.<sup>2</sup>

#### Other Crimes

Setting fire to grass or reeds near the Lake was made a crime under the 1924 Native Authority Ordinances. These places are presumed to be the resting place of the ancestor spirits.<sup>3</sup> A man who set fire to a field whether there were any crops in the fields or not, was presumed to be "wamisala", i.e. lunatic and was liable to be put in a gori stick. Although he was not answerable to such acts, his people, were expected to pay compensation. If he was found not to be insane he then was presumed to have been drunk but the punishment was the same except that in

- 
1. Interview with Manda.
  2. Interview - Mwakasungula.
  3. Werner, A., p. 267.

this case the brewer was also brought to trial and had to explain if his beer was bewitched.<sup>1</sup> Setting fire to grass was still considered illegal under the 1933 Native Authority Ordinances, under the duties of Principal Headman.<sup>2</sup>

Imprisonment, as a form of punishment was not practised among Malawi societies, because people who were guilty of crimes were detained as slaves until ransomed. This was so because compensation took the place of punishment<sup>3</sup> as stated above.

It was not until 1905 that the system of detention in prisons was effectively established.<sup>4</sup> According to Miss C. Smith, Superintendent of Holloway Prison, Britain spends £17,000,000,000 (Seventeen million pounds) for the upkeep of its prisons and prisoners. She suggested that prisoners should go out and work, pay fares, union rates, National Insurance contributions and with the balance of their wages compensate the victim's family. In short

- 
1. Interview - Che Lubani.
  2. The District (Native) Administration Ordinance S.10.
  3. Werner, A., p. 267.
  4. Prison Ordinance 1905, British Central African Gazette, 181, Vol. XII, No. 12, 1905, p. 467.

criminals should be made to lead constructive lives.<sup>1</sup>

Miss C. Smith clearly agrees with Malawi law as it was before the introduction of English law.

It should also be mentioned that among the Yao, if the criminal was not killed on the spot by the victim's friends or relatives, he was compelled to pay compensation to the victim's family. He would have to support the victim's family for the rest of their lives or until they were married if there were children or the victim's wife remarried.<sup>2</sup> Therefore prisons as such were not necessary as the court saw to it that compensations were duly paid.

And in default of such payment the defendant was made a slave. If the accused was detained on failure to pay compensation he was detained not by the Chief but by the relatives of the victim.

Property Law - It is recorded of the Yao that a man was entitled to as much land as he could cultivate, the limitation being that he should consult the headman or his Chief as to his neighbour's boundaries.<sup>3</sup> MacDonald adds

- 
1. B.B.C. 1 - Cliff Michelmore - Interviewer Thursday, 22nd April, 1965.
  2. Interview - Che Lubani.
  3. MacDonald, D., Africana, Vol. I, p. 177.



that as soon as a man hoed a field the ground was entirely his own.<sup>1</sup> He also stated "It has been said with reference to various parts of Africa that the soil belongs to the tribe, and that, according to the native idea, no Chief has a right to make grants of land. But I found Chiefs always willing to grant as much land as they were asked for.....".<sup>2</sup> This seems a case for individual rather than tribal ownership of land, but what is certainly not clear is whether the right of alienation of this land was enjoyed by the Chief alone in which case others only had usufructuary rights. If this is so, then one can assume that this is the sense in which he says earlier that "In the Yao language the Chief is expressly called the 'owner of the soil'".<sup>3</sup>

In relation to the Cewa and the Nyanja the Chief was nominally owner of the land which he allotted to his Headman, who in turn parcelled it out to the villagers. A man was entitled to the use of trees, ant-heaps, honey, etc., on his plot and might sell the produce thereof but he could not sell or lease the land. The Chief alone had

---

1. Ibid., p. 177.

2. Ibid., p. 177.

3. Ibid., p. 175.

the power of alienation and he could not use it except with the common consent of his advisors.<sup>1</sup> This would seem to be a form of trust. Cultivation was the basis of ownership of land. From the foregoing it would seem to be limited ownership, for though it might include individual enjoyment of benefit from the control of the land the right of alienation was not included. Among the Malawi people, rights of cultivation of land were allowed, but rights in land could not be sold though they could be given away.<sup>2</sup> In this case the donee could only hold it himself but could not sell. Rights could only be sustained by continued residence in the locality, although widows could continue to cultivate their dead Husband's plots. The fact that rights could only be sustained by continued residence suggests that land was communally owned.

Elias contends strongly that the "radical title to land remains with the family or the community," the individual having a right only to its use.<sup>3</sup> In other words, the community has the ownership, while the

---

1. Werner, A., p. 271.

2. Werner, A., Natives of British Central Africa, op. cit., p. 271.

3. Elias - Nature of African Customary Law, p. 163.

individual has the possession. Elias states that the Chief is everywhere regarded as the symbol of the residuary, reversionary and ultimate ownership of all land owned by a territorial community. Hence the Chief holds on behalf of the community in the capacity of a caretaker or trustee only, but he allocates portions of land to family heads according to their needs and they in turn reallocate it to their members. The position among the Cewa was that the land was owned by the community and held in trust for them by the Chief.<sup>1</sup> Individuals only had rights of use of portions. It would be incorrect to introduce the notion of individual ownership based on cultivation. As regards the Yao, MacDonald contested any suggestion of tribal ownership of the land. There is, however, a conflict between the individual ownership based on cultivation and the Chief's "ownership of the soil". It seems the position was just the same as with the Cewa. Members of the community only had rights of the use of the land but only the Chief who acted on behalf of the people could alienate the land. It would seem that this was probably the situation in Malawi

---

1. Interview - Chief Kachere. Also Rangeley, W.H.J., Notes on Cewa Tribal Law, op. cit., Vol. I, No. 3, p. 52.

society and that no man including the Chief could point to an acre of land and allege that he "owned" it.<sup>1</sup>

Before Britain acquired Malawi there seems to have been no shortage of land.<sup>2</sup> All the people under any particular Chief were able to acquire enough plots of land. Whenever there was any doubt about the ownership of a particular area or plot of land the matter was decided by the Headman. Such matters would only be decided by the Chief himself if they were of a serious nature.<sup>3</sup> But when the system of Certificates of Claim was introduced whereby Certificates were issued to those who could show that they had occupied the area for a long time or could show evidence that they had bought the land from some tribal Chief.<sup>4</sup>

The idea of permanent ownership of land scarcely existed in Malawi before the arrival of Europeans.<sup>5</sup>

Theoretically no one was supposed to own land, except as

- 
1. Werner, A., Native Races of British Central Africa, op. cit., p. 271.
  2. Stannus, H.S., "The Wayao of Nyasaland" Harrard African Studies, Vol. III, 1922, p. 281.
  3. Ibid., p. 281.
  4. Johnston, H.H., British Central Africa, op. cit., p. 113.
  5. Werner, A., Native Races of British Central Africa, op. cit., p. 271.

he actually cultivated it.<sup>1</sup> But owing to the method of shifting cultivation, land was abandoned every few years. Hence one would lose his right of occupation if it was given away during that period. Any member of the tribe could make a fresh garden where he liked, provided no one had in the meantime occupied the area; a stranger would require the Chief's permission to use the land. Werner adds that "the Chief's land is well defined and has recognised boundaries, but there seem to be no definite limits to the territory occupied by the tribe."<sup>2</sup>

However, in cases of frequent changes from village to village, due to tribal wars, the question of ownership would not entail too elaborate an arrangement between the moving-out owner and the Chief: it was more of a formality than anything else if he did so for the Chief to get the consent of the past owner, the land being considered as belonging to the village and the Chief, thus, it was always left to the Headman or the Chief to deal with such matters, and not the previous occupier.

The rigidity of the custom in regard to the ownership of the land where the Chief was a mere trustee for

---

1. Ibid., p. 271.

2. Werner, A., Native Races of the British Central Africa, op. cit., pp. 271-272.

the community, brings doubt about the legality of the alienation of the land by the Chiefs to the British commercial companies and the British government represented by Sir Henry Johnston. The matter though of importance has never been solved, mainly because of its political nature.

### CHAPTER III

#### Family Law - Marriage, Divorce and Inheritance.

In Malawi societies, there are different forms of marriage. Among these communities male adults are usually influenced by the community and their family in the choice of a wife. Theoretically, there is no limit to the number of wives a man may have; but this was true of the era when women were dependant either on their parents, the husband or future husband.

Owing to the influence of education and Christianity, women of Malawi are today more independent than they were, and are reluctant to marry a man interested in polygamous marriage. A woman who remained unmarried for a long time was looked down upon, and could be regarded as a prostitute. Parents tried to avoid such instances, and betrothed their daughters in infancy. However, marriage was impract<sup>ic</sup>able until the girl reached the age of puberty. In some cases betrothal was conditional until birth. In this cases, the suitor or his parents gave a present to the potential-in-law which was returnable if the child proved to be a boy! It was also refundable if the girl came of age and

refused to ratify the engagement.<sup>1</sup>

Werner pointed out a case where a Yao girl promised by her parents to an elderly man, refused to marry him when the time came as she preferred Tambala, a young teacher in Blantyre. The old man refused to give up his claim and a day or two before the girl's marriage, Tambala was found dead in the gardens near his village - killed by the disappointed suitor.<sup>2</sup>

Such incidents show that women were under pressure to marry men in whom they had no interest.<sup>3</sup>

When a girl grew up and refused the marriage arranged by her father, the father took the gifts and returned them to the suitor. Sometimes he offered him another daughter; this was a practice also used when the wife proved barren.<sup>4</sup> However girls were not always betrothed in this way.

A second form of marriage, was, according to Ngoni and other patrilineal societies that wives

---

1. Interview with Chief Chakhumbila.

2. Werner, A. The Natives of British Central Africa, 1906  
Op cit. p. 150.

3. Livingstone, David & Charles, The Zambezi and its Tributaries, op. cit. pp. 249 - 284.

4. Read, M. The Angoni of Nyasaland. op cit. p. 126.



were inherited by the successor of a deceased relative.<sup>1</sup> He also inherited the wives of his maternal Uncle if the latter had no younger brother living at the time of his death. Wives were inherited not for the sake of passion or sensuality, but so that the old and lonely widows were not neglected and left in misery. The young husband may not necessarily have sexual desire for women who were sometimes older than his mother, and who had passed child bearing age, thereby being unable to bear him children which were the pride of the community. In fact they were only wives in name. The inherited wives continued living in their huts but supported by the deceased husband's brother or uncle who was now her husband. For it was a common practice that widows though old were to be taken care of by their husband's successors. The new husband was under a moral obligation to repair their huts, buy calico and do other little things which made their lives endurable.<sup>2</sup>

Another form of marriage was that wives were captured in a raid. If men raided a village, they carried off some of the girls who would become their

---

1. Read, M. The Angoni of Nyasaland, op cit. p. 126.

2. Werner, A. The Races of British Central Africa, op cit. p. 167.

wives unless they were redeemed by their people.<sup>1</sup>

But such a marriage was not by custom often practised. When women were taken in such raids they became slave wives or junior wives, but this was not a normal form of marriage.

MacDonald noted that another form of procuring a wife was by buying. The statement "buying wives" is perhaps in reference to bride price, as Malawi societies do not seem to have sold their daughters in marriage.<sup>2</sup>

As stated by Livingstone although the bargain<sup>3</sup> appeared to be a commercial transaction there was no buying of wives among these people. The buying was not that of the wife but of the Right to retain children which may be born to the family.<sup>4</sup> It should also be added that it was also buying the right to take the daughter, i.e. the wife to be from her father. In addition, the bride-price would seem to be a form of token to his parents-in-law.

1. MacDonald, Africana Vol. 1. Op cit. p. 133.

2. Werner, A. The Native Races of British Central Africa. Op cit. p. 129, and see MacDonald, Duff, Africana Vol. 1. p.

3. Livingstone, David & Charles, The Zambezi and its Tributaries, op cit. p. 284 - 285.

4. Ibid. pp. 284-285.

### Other Forms of Marriage

Just as in child-betrothal, there was also betrothal amongst adults and when a man saw an unmarried woman and he wished to marry her, he would talk to her people who would ask her about her feelings towards him. If she liked him, the man told his 'Surety' who might be either his father or his maternal uncle, elder brother or the Chief of his village,<sup>1</sup> but only if related to that Chief.<sup>2</sup>

Having obtained the Surety's consent, including that of all the relations and the grandparents, he would then go to the young woman's village and tell her maternal uncle if any.

Among the Yao if the girl consented the man's relations were called as witnesses. They all sat in a Bwalo and preliminary discussions took place.<sup>3</sup>

A house was often assigned to them after all the preliminary arrangements were completed. They lived in that house until the man built his own home; this was the accepted custom amongst the Nyanja and Yao if it was

---

1. MacDonald, Duff. Africana. p. 136.

2. Heckel Benno. "The Yao Tribe". Studies and Reports. Oxford Univ. Press. 1935. p. 16.

3. Interview with Chief Chakhumbila.

the marriage of a free woman.

When the house was nearly completed the man called his own people to meet his bride's family and the marriage was ratified. The fact that the house was incomplete when the marriage was concluded and the parties assigned to a home not belonging to them is perhaps what led Heckel to say that this was a trial marriage.<sup>1</sup> But trial marriages were unknown among Malawi people for the future son-in-law is not allowed access to his fiancée until all the negotiations are completed and the anhhoswe has consented.

The parties consent was of prime importance, hence it is true that among the Yao there were few arranged marriages. Today, families can hardly arrange marriages for their daughters as young people have the chance of meeting each other without their parents introduction. The intending couples are brought to their parents after they have themselves decided upon the matter.

Today it is an accepted custom that male adults sometimes take the initiative to speak to the girl directly. When the father of the girl approves of the suitor he

---

1. Heckel, Benno. "The Yao Tribe". op cit. 1935. p. 19.

accepts "Chikole", a symbol of their intending engagement. The couple are then considered as engaged to be married, once this arrangement is approved by their respective families.

Whereas the marriage negotiations of the matrilineal societies are entirely in the hands of the senior maternal uncles of the couple, their fathers usually had little say in the matter, but of course they too had to consent. A marriage was however considered valid if it had the consent of their uncles alone without the father.

Among the matrilineal societies marriage is matri-local. The village grew larger as more of the women got married and more children were born. The husbands who came to the village were not considered members of the family, but the children born to them were. The husband always remained a stranger to the wife's family.<sup>1</sup>

It is very seldom for a wife to be taken to the husband's village, among the matrilineal societies. This could happen if the husband was a chief.

Among most tribes in Malawi the man presented

---

1. Ibid. p. 17.

his future father-in-law with a gift as an overture to the actual talks on matrimony. After it was decided that the wedding would take place, the bride-price was settled. Where this was practiced the entire family joined in the feast comprising goat or chicken flesh and beer. Gamitto stated that the husband become the absolute master of his wife after the ceremony.<sup>1</sup> He had the authority to pawn her in case of a pending debt.<sup>2</sup> However this was not the case if the wife was a free wife for he could pawn only a slave wife.<sup>3</sup>

In some societies, there was a public negotiation of marriage and payment from the suitor's family to the woman's family. Among these communities payment gave marriage its tangible content. Though bride price was paid women never lost contact with their home village, even in cases of divorce.<sup>4</sup> However slave marriages were not in practice granted the same formal negotiations.<sup>5</sup> Divorced women who remarried were linked to more than

---

1. Gamitto, King Kazembe. Vol. 1. p. 94.

2. Duff, H.L., Nyasaland under Foreign Office, op cit. p. 235.

3. Interview - Chibamso - Y.Q.

4. Van Velsen, J., Politics of Kinship. Op Cit. p. 54.

5. Macdonald, Duff. Africana, Vol. 1. pp. 140 - 141.

one marital village, for relationship continues even in cases of divorced couples. Should a couple fail to get the approval of the Nkoswe they could run away. The marriage was usually regularised in the end if the sponsors came to some agreement. Should the woman be pregnant, the meeting of the Nkoswe was postponed so that the "Cisamba",<sup>1</sup> that is, the ceremony of the first pregnancy could take place.

This signified the fact that the unborn baby was of more importance than the actual tying of the marital knot and also of the fact that the community awaited the coming of a new member. In addition it was obvious that the status of the unborn child, whether it be conceived within or outside wedlock, did not affect the reception accorded to it by the community.

As a consequence, Malawi society looked upon marriage primarily as an institution for the rearing of children towards a prosperous communal life and so it was not surprising to find that barrenness on the part of a woman or sterility on the part of a man was a ground for divorce.

---

1. Stannus, H.S., Notes on some tribes of British Central Africa, 1910. Royal Anthropological Institute Journal Vol. XL. 1910. p. 237.

If an unmarried woman was pregnant her uncle or other relative was informed, and he called on the relatives of the punitive father. If he denied the fact, he was taken to Court, there being little chance for him as in these societies, legal presumptions were weighted heavily against a man. Outside court the woman's uncle etc. had no means of enforcing damages. If the man accepted responsibility, the woman either lived with him or stayed in her own village and the man made financial contributions towards the upkeep of the child and the Mother.<sup>1</sup> But this upkeep by him was unnecessary in a matrilineal community as the parents of the woman usually took care of the baby.

Lepers were not permitted to marry, and people suffering from epilepsy and the insane were debarred from marriage.<sup>2</sup>

The marriage ceremony was an important factor in tribal marriage, but marriage was still considered valid in the absence of the ceremony. When the parties lived together with the full knowledge of the girl's family and where children were born as a result of such a union

---

1. Interview with Mwakasungula.

2. Interview with R. Kalengeza.



the marriage was often ratified.

Regarding the time for the commencement of co-habitation among the matrilineal societies, it was the girl's uncle who suggested it, with the consent of her father.

In all social groups of Malawi it was a common practice to have a marriage Nkoswe in the event of a marriage, but their functions varied with different groups. With the Tonga, he was the "trustee" of the marriage, and he held himself responsible for the marriage throughout its course. He regarded himself as a failure if the marriage was unsuccessful or unhappy. Apart from this function, he settled disputes between the couples and between the families in any matter. He was considered as an important witness in a formal marriage. He was also a Nkhoswe representing the kin group of either the bride or the groom. It was possible for the sister to act as a Nkhoswe on behalf of her married brother or sister. During the time when slavery was practised, slaves had no Nkhoswe to act for them. But the master could do so.<sup>1</sup> The Nkoswe, if representing the groom's kin group, was liable for any debts in payment

---

1. Johnson, P.W., Nyasa The Great Water. Oxford University Press, 1922. p. 69.

of bride wealth.<sup>1</sup>

Unlike the Tonga and the Lomwe, the Yao Nkoswe was more of a patron than an active trustee to the marriage, although he settled occasional marriage disputes.<sup>2</sup>

Neither Mitchell nor Heckel drew a clear distinction between the period when a man became Ankoswe as a surety and when his status changed to that of a patron.<sup>3</sup> In normal circumstances, Ankoswe continued his duties as long as the marriage was unsettled due to some difficulties in that family, and Ankoswe could remain a surety over that family over a long period, after which, on the marriage becoming more settled and secure, he became a patron whose intervention was not so often needed. The same person might be a surety and later become a patron. This simplified the situation when the evidence of the surety became necessary at some other time, and when that person was no longer a surety but a patron.

The number of the Ankhoswe was not often defined. But sometimes there were cases where there were

---

1. Ibid. p. 70.

2. Interview with Ghe Somaufe.

3. Mitchell, J.C. The Yao Village. Manchester Univ. Press. 1956. p. 149.

four in number as two came from each family, that is the family of the bride and the bride-groom.<sup>1</sup> The Ankhoswe were usually uncles and aunts of respective parties. Unlike the Tonga and the Ngonde the duty of the Ankhoswe among the matrilineal societies especially among the Lomwe was to safe-guard the relationship of the immediate family to which he was the Ankhoswe. His duty did not extend to the families of the couple to which he was the Ankhoswe as was the case among the Tonga and the Angonde.<sup>2</sup>

The duties were in short as follows:

- a) To arrange the marriage.
- b) To advise the couple, whenever in difficulties.
- c) They also became the spokesman of the families of the couple, but this was only done among the Tonga<sup>3</sup> and the Ngonde.

In most cases there was no valid marriage without the consent of the Ankhoswe.

The office of the Ankhoswe was a perpetual one, but when the elder Ankhoswe died, where there were two,

---

1. Interview with R. Katengeza.

2. Interview with Mwakasungula.

3. Van Velsen, J., Politics of Kinship. Op cit. p. 82.

the younger one became the elder Ankhoswe and another one appointed.<sup>1</sup> Should the younger one die, then another one is appointed in his place.

### Bride Price.

Cattle was paid to the father of the bride; this formed a portion which she could claim in the event of her being driven away by a cruel husband. In this case the husband lost the bride price because of his cruelty. If the wife was at fault the husband would retain the bride price.<sup>2</sup>

Elmslie stated that "in the absence of a nobler settlement, it was in some degree a method by which the interest of the wife was protected. But such grounds could not be defended socially or morally".<sup>3</sup> As was the feeling with many missionaries in regard to polygamy and bride-price in Malawi, Elmslie's statement that this could not be defended morally is attributable to the fact that such a system was contrary to the

---

1. Stannus, H.S. "Notes on Tribes of British Central Africa", The Royal Anthropological Institute Journal, 1922. p. 235.

2. Van Velsen, J. "The Politics of Kinship". op cit. p.

3. Elmslie - Among the Wild Ngoni, Op cit. p. 58.

Christian concept of marriage. The bride price among the Ngoni might be paid even while the girl was young, and among the Ngonde it was arranged even before the baby girl was born. In these cases the boy must already have been born, as the future husband should always be older than the wife.<sup>1</sup>

### Polygamy.

This form of marriage was and still is practiced among certain peoples of Malawi. As a rule a man could have one or more wives who were free women, while the others were generally slaves and were called junior wives.<sup>2</sup>

He could acquire more free wives, by inheriting his elder brother's free wives. Therefore Levirate union was practiced among some Malawi people. In this case the inherited free wives could remain in their original homes thus avoiding the friction which might arise between his own free wives and the inherited free wives. If the new husband inherited any young wives he could dwell with them on certain days of the week,

---

1. Interview - Mwakasungula.

2. Werner, A. Native Races of British Central Africa.  
op cit. p. 133.

and at other times he would live in his own village or where his original free wives resided.

Among the Yao the number of wives does not seem to have been restricted, it might however be limited to his ability to provide for them. But he might also have slave wives in addition. A senior wife was called "Kusyeto", junior wives were called "Mangumba". Islamic religion restricted the number of wives to four. It would seem therefore, that the Islamic law of marriage restricting a man to four wives did not affect the Yao marriage laws,<sup>1</sup> as the Yao male adult could have as many wives as they wished, especially the chiefs.<sup>2</sup>

If he was the Chief of the village, his first free wife got the title of msyene "wa musu", or possessor of the village.

After being married a year or two the husband might desire another wife, especially if the first wife did not have any children. This was because children were considered the pride of the family. In addition the junior wife became a help and companion to the first wife.

---

1. Hetherwick, A. "Islam and Christianity in Nyasaland" in Muslim World. Vol. 17. 1927. pp. 184 - 6.

2. Werner, A. The Native Races of British Central Africa. op cit. p. 133.

In addition more wives enhanced his social status in the village. As a matter of courtesy, the senior wife was sometimes consulted by the husband before he married the junior wife. But it would seem that she had little or no influence if the husband had made up his mind to marry another woman.<sup>1</sup>

If the first wife had a child, customary law insisted that the man should have another wife. This was based on the fact that if a woman had a child every year the mother would not be strong enough to look after them as well as attend to other domestic matters and therefore, the mother and her children would suffer. Hence Malawi custom forbade a woman to have a child until three years after the first one. It was on this ground that Heckel records in his work on the Yao that "babies are suckled till the third year",<sup>2</sup> as this is so because two children cannot be suckled during the same period. In this way, Malawi society used polygamy as a means of birth control, or what is now known as family planning.<sup>3</sup> Excessive child birth was

---

1. MacDonald, Duff, Africana, p. 134.

2. Heckel, Benno, "The Yao Tribe". op cit. p. 15.

3. Interview Mwakasungula.

checked by this system in that frequent access to one wife was eliminated by the fact that he could have access to other wives.

Because of polygamy, destitute widows, old people, lonely spinsters and even professional prostitutes and orphans were unknown among Malawi tribes.<sup>1</sup> Children born to any of the wives were treated as a child of the "family", therefore, if any of the mothers should die the orphans were not left without a "mother".

The chiefs had great pride in showing their wealth and status by having many wives, and the Angoni chiefs were in the habit of demanding additional wives from time to time from their subjects whom they defeated, making them send up a selection of their daughters, while their sons were sent to herd the Chief's cattle.<sup>2</sup>

It is not surprising that Makololo and Ngoni had many wives who were given to them as tributes by the defeated people from the other villages.

Elmslie stated that junior wives were often maltreated by senior wives, who due to jealousy of the

---

1. Interview with R. Katengeza.. "The Wayao of Nyasaland".

2. Stannus, H.S., Havard African Studies. Vol. III. 1922. p. 236.



younger wives brought charges against them. The husband who did not investigate into such matters usually asked the junior wife's family to take her away.<sup>1</sup> That was so because usually a senior wife was an important member of the immediate family of the husband. As a result, it would be difficult for the husband to champion the cause of the junior wife, even if she were in the right. It was therefore not surprising to note that the Elmslie had to take care of them, knowing that they too had their legal rights within their own families, but being a foreigner he could not take up the matter on their behalf and nor would custom allow it.

A man was by custom not allowed to strike his wife,<sup>2</sup> unless it was for disciplinary measures, especially if the wife was young. Striking a woman other than one's wife was a criminal offence.<sup>3</sup>

When a husband caused his wife to run away he would not be allowed to take her back unless he paid damages to the Ankhoswe for having caused her to run away. It was on this ground that a man asked Elmslie

---

1. Elmslie, Among the Wild Ngoni. Op cit. p. 42.

2. Ibid. p. 42.

3. Heckel, Benno, "The Yao Tribe". op. cit. p. 36.

to give him a piece of cloth to be paid to his wife's Ankhoswe as damages. This often happened to missionaries because of their close contact with the Africans. But the Home Mission did not favour the activities of the missionaries in settling these disputes and forbade their continuance.<sup>1</sup> Should the wife run away to her people without proper grounds, it was she who was deemed to be at fault and if repeated she could be divorced on this ground.

The senior wife, had the superintendence of the domestic chores and agricultural work. She kept the other wives at work and had the power to exercise disciplinary measures on the impertinent wives. The punishment she inflicted for laziness was to banish the unfortunate junior wife from meals until hunger forced her to apologise. When a junior wife was obstreperious the senior wife could put her in a slave stick,<sup>2</sup> but this could only be done with the permission of the husband.

Livingstone writing of the Makololo felt that polygamy was a sign of low civilization and source of many evils. But as was noted by Livingstone himself

---

1. See under Male Adult and Missionaries Chapter 61 Part 2.

2. Stannus, H.S., "Notes on Some Tribes of British Central Africa". op. cit. 1910. p. 309.

this form of marriage was accepted by the women themselves.<sup>1</sup>

### Widowhood.

There are two systems of descent among the Malawi tribes, therefore it is important to deal with these differences in regard to marriage and inheritance. Among the matrilineal societies the husband brought his goods, and resided at his bride's home. In cases of divorce he moved his goods back to his home except immovable things such as the house. But the man left some of his property for his children who belonged to the mother's family unless she deserted him when he would have the custody of the children.<sup>2</sup> If the wife should die the husband remained with his wife's family if they liked him, and might give him another daughter<sup>3</sup> in marriage.

If a man's wife died, by custom he gave an offering to her spirit, then proceeded to find another

---

1. Livingstone, David and Charles, "The Zambezi and its Tributaries". op cit. p. 234.

2. Stannus, H.S., "Notes on Some Tribes of British Central Africa". op cit. 1910. p. 309.

3. Interview with Chehubani.

wife, but he might not do so for sometime. This was the mourning period. Failure<sup>ing</sup> to do so, his deceased wife's people could take him to the Nkhoswe on the ground that he might have expedited her death. Where the husband was polygamous the period before he could marry another woman was usually observed as he had the company of his other wives and was not in a hurry to marry in a shorter period after her death. The widow's period of mourning was longer among certain Malawi social groups, especially if the deceased husband left young children who belonged to her and her people, but only if she came from matrilineal society.

In most Malawi societies a widow's relationship with the members of her dead husband ended at his death when she could remarry.

Among some groups, notably the Ngonde and Ngoni the widow was inherited by the husband's brother together with his property.<sup>1</sup> The system of inheriting a man's widow together with his property reduced the widow to the level of a chattel, in that she had no right of leaving her deceased husband's home. Among the Ngoni the system was so rigid that the widow was

---

1. Read, M. The Angoni of Nyasaland. op cit. p. 126.  
also Interview with Mwakasungula.

given no choice but to remain in the husband's family and had to marry one of the husband's brothers,<sup>1</sup> and it could be deduced that neither the widow nor the brother had any choice in the matter. On the other hand, the Nyanja had a more liberal attitude on the matter; where the widow could return to her family. If she accepted to marry the brother of her deceased husband and he refused to marry her, he sent an arrow<sup>2</sup> symbolising that she was free to marry any other person. In that case, the gifts given by the deceased husband were not returned to him,<sup>3</sup> even if substantial gifts had been given during the marriage as the dead husband's brother was at fault in refusing to marry her. In divorce cases the arrow was a symbol which gave her a right to kill him with it should he return secretly to her home.<sup>4</sup> It is necessary to note that even among the Ngoni she could be free to marry, but only after she had been there the years indicated by his people as signified

---

1. Read, M. The Angoni of Nyasaland. op cit. p. 126.

2. Stannus, H.S. "Notes on the Tribes of British Central Africa". (1910) p. 309.

3. Werner, A. The Native Races of British Central Africa. Op cit. p. 168.

4. Stannus, H.S. "Notes on the Tribes of British Central Africa". Op cit. p. 309.

in the beads given to her by the husband's people.  
Each neckless symbolised one year.<sup>1</sup>

Position of wives.

When slavery was practiced, a husband was liable for the debts incurred by his junior wives. In the case of a free wife the husband was not responsible. This was the responsibility of her relatives if she was from a matrilineal society. Thus her debts were paid by her uncle who had the prior right of "pawning" her in case of default in payment of any debts, whereas the husband had the prior rights to pawn his junior wives,<sup>2</sup> because his slave wives were considered his property.

In the case of a free wife among the Lómwe, the accuser went with the evidence before her Nkoswe. If the evidence was not substantial, the case was dropped, but if the accuser had a chance of incriminating the woman, her Ankoswe would call her and she had to go to Court, and her husband had no power in the matter.<sup>3</sup>

---

1. Interview - Chief W. Gomani.

2. MacDonald, Duff, Africana. Vol. 1. pp. 140 - 141.

3. Interview - Makhumula.

She was however defended by her uncle or anyone in loco-parentis to her.

If she should confess to the charge, her Ankoswe paid the fine. If she denied the charge, she appealed for the poisoned ordeal - mwavi, which if she should drink and survive, proved her innocence. She would then receive a fine which was paid to the Ankoswe and not to her husband. In this case the plaintiff paid a number of slaves to the Ankoswe who retained them.<sup>1</sup>

If she should die, her guilt was proved; the plaintiff was entitled to restitution of the stolen goods or their value in kind, and a fine was also imposed.<sup>2</sup> The Ankoswe was responsible for the payment of the fines and the restitution of the goods.

### Marriage with slaves.

If one of the parties to the marriage was a slave, such marriage was readily dissolved.<sup>3</sup> The free spouse could divorce the slave partner, but in a few

1. Ibid.

2. Duff, H.L. Nyasaland Under Foreign Office. op cit. pp. 315-316.

3. MacDonald, Duff, Africana. Vol. p. 141.

cases the slave partner could also divorce the free spouse although this was not so easily done. Polyandry was not practiced among Malawi communities. On this subject Macdonald stated that "In no case can a woman, even if she possesses many male slaves, have more than one husband".<sup>1</sup>

### Divorce.

With both matrilineal and patrilineal societies, desertion was a ground for divorce for both the wife and the husband. The Ankhoswe however would first have to satisfy themselves of the validity of the case. The period for desertion does not seem to have been specified. The test was not whether there had been a certain period for desertion but whether there was desertion at all.<sup>2</sup> A wife who deserted her husband lost all the immovable property which the husband had brought to her home if she came from a matrilineal society.<sup>3</sup> In the case of patrilineal society in similar circumstances the husband kept the child of the marriage.

---

1. Ibid. p. 141.

2. Interview - R. Katengeza.

3. Stannus, H.S., "Notes on Tribes of British Central Africa." op cit. p. 237. 1922.



### Adultery.

This was a ground for divorce for both parties among matrilineal societies.<sup>1</sup> But with the Tonga the wife could not use this alone as a ground for divorce. She must have other reasons in addition to the adultery.<sup>2</sup>

As in the case of the Tonga and the Ngoni adultery alone was not a good ground for divorce for the wife. She must in addition have another ground such as cruelty.<sup>3</sup> Other grounds for divorce common to most Malawi social groups were laziness on the part of the wife and cruelty on the part of the husband.<sup>4</sup>

Spouses could among the Yao also divorce by mutual agreement.<sup>5</sup>

Barrenness<sup>h</sup> on the part of the wife appears to be a ground for the husband to divorce her. But on this ground it was possible for the family of the wife to offer another daughter to that husband. In this case the other daughter who was usually older would not be

---

1. MacDonald, Duff, Africana. Op cit. p. 139.

2. Interview with W.M. Chirwa.

3. Interview with Chief Chalchumbila.

4. Stannus, H.S. "Notes on the Tribes of British Central Africa" op cit. (1922) p. 237.

5. Ibid p. 237.

divorced. But he was not expected to pay any more bride price, especially so among the Ngoni.<sup>1</sup>

Among the Yao frequent death of the children in infancy were stressed as a ground for divorce on the part of the husband.<sup>2</sup> But among the Ngoni he could on the same ground be given another daughter and would be expected to keep the other daughter.<sup>3</sup>

#### Property after divorce.

Among the patrilineal societies the wife gave up all the immovable property even though it had been acquired during the time she was married to her husband. She was however, able to take away little things which she may have brought to the home.<sup>4</sup>

In matrilineal societies on the other hand the husband was the loser in connection with the immovable property,<sup>5</sup> as the property was left at the wife's home.<sup>6</sup>

---

1. Read, M. The Angoni of Nyasaland. Op cit. p. 126.

2. Interview - Che Lubani.

3. Interview - Chief Chakhumbila.

4. Werner, A., British Central Africa. op cit. p. 153.

5. MacDonald, Duff. Africana. Vol. 1. op cit. p. 140.

6. Stannus, H.S. "Notes on the Tribes of British Central Africa". op cit. p. 237 1922.

Among the Lomwe however, he could take away the doors and windows from the house that he built.<sup>1</sup>

The main reasons for the leaving of the property where the home was established would seem to be based on the ground that the property remained wherever it was permanently established, as otherwise it would often involve the destruction of such property. Hence a house was often deemed to be the property of the person at whose home it was built. It follows then, that as houses were built in wives homes in matrilineal societies such houses should always remain the property of the wife.

It was on this same ground that the house often remained the property of the husband in patrilineal societies as homes were established there.

#### The Position of Children after Divorce.

This question depended on whether the parties came from matrilineal or patrilineal societies.

In matrilineal societies children belonged to the mother's people.<sup>2</sup>

---

1. Interview - Makhumula.

2. MacDonald, Duff, Africana. Vol. 1. op cit. p. 114.

In patrilineal societies the children belonged to the father, whether the bride price was paid or not.<sup>1</sup>

However there was usually an agreement that the children should visit the home of their mother when she is divorced. And in practice this was expected especially where the children were grown up. In addition when the children came of age they could choose to live with any of the spouses.

After the divorce, the divorced wife was free to marry again. But these divorced wives often kept contact with their divorced husbands,<sup>2</sup> especially if there were any children of the marriage. Among the Yao she was able to show her arrow given to her by the divorced husband which symbolized that she was free to marry again.<sup>3</sup> This arrow, although in practice was not produced to the second husband, would seem to take the place of a divorce certificate to-day.

---

1. Read, M. Children of their Fathers. op cit. p. 72-3.

2. Van Velsen, J. The Politics of Kinship. Op cit. p. 107.

3. Stannus, H.S. "Notes on the Tribes of British Central Africa". op cit. p. 237. 1922.

### Inheritance and Succession.

Among the Yao, when a man died, a part of his goods was buried with him, and some part paid for the services of the funeral. Apart from the funeral expenses, there was the cost of legal investigation into the cause of death; and if this was not paid out of the damages from the defendant, the cost of the investigation would be too expensive; if at all, the damages were paid to the Diviner. The remainder of his property, including his wives and children, who passed on to his heir.<sup>2</sup> A man's heirs were not his sons, but his brothers, according to seniority, and failing them, the sons of his eldest sister in similar order, so that the next heir after a man's younger brother was his nephew.<sup>3</sup> By this custom, a man's own children were purposely set aside, and the reason given by the Yao was that they wanted to be certain that the heir really had the family blood in his veins, and they could not trust that a man's sons answered to this description as his wife may have been unfaithful. In

---

1. MacDonald, Duff, Africana. Vol. 1. op cit. p. 44.

2. Werner, A. The Native Races of British Central Africa. op cit. p. 167.

3. MacDonald, Duff, Africana. Vol. 1. op cit. p. 189.

addition as many Chief's wives were slaves it was necessary that children of such mothers should not rank as heirs.<sup>1</sup> If the rightful heir be a minor, i.e. a mere child, someone deputed for him until he came of age. The first born always had precedence, the younger brother being disregarded.

On the day of entering on his inheritance, the heir married not only the junior wives but the senior wives as well. The wives were allowed to keep their property. Sometimes this had been her own property especially where she was a herbalist. In addition a successor inherited all slaves of a deceased chief, including his chattels, ivory, gardens, and guns; after the introduction of guns by the Arabs. The dependants who had used these during the chief's lifetime made claim to the new chief in order to have continued use of them. Such a claim was usually granted.<sup>2</sup>

The accession to the chieftaincy with most Malawi communities was essentially a formality, as the existence of the next chief was well known. The exception

---

1. Mitchell, J.C. The Yao Village op cit. p. 69.

2. Stannus, H.S. "The Wayao of Nyasaland" (1922). p. 277.

to this general rule was among the Ngonde. With them, accession took place through the leaders of the local population and the central power, i.e. the Makambala or the noblemen. The selection was by election of the hereditary heir from amongst those who were entitled to the succession.<sup>1</sup>

Their choice was determined by such qualities as maturity, wisdom, courtesy and generosity.<sup>2</sup> This system of accession had its advantages to the community as the man came to the throne after a careful selection by the Makambala, and, through his own qualification of the virtues of leadership, whereas among the other tribes a man assumed kingship as a matter of right, regardless of whether or not he was capable for such an office.

The legal position was this:

- 1) A man's eldest sister's first born was the rightful heir.
- 2) Formerly in the Zomba areas, collateral brothers came in preference before nephews.<sup>3</sup> But it was

---

1. Wilson, G. "Constitution of the Ngonde" in the Rhodes Livingstone Papers. Vol. 1-8 1939. pp. 55-6.

2. Wilson, G. "Constitution of the Ngonde" (1939) p. 60.

3. Mitchell, J.C., The Yao Village op cit. p. 160.

also stated by MacDonald, that succession would follow from a man to his eldest surviving brother and then to his sister's son.<sup>1</sup>

- 3) Succession to headmanship depended on the support of the women and the whole village. This was attributable to the power enjoyed by the women among the Yao.<sup>2</sup> Where in addition a woman could become a chief and enjoy the same rights as the male chiefs. Some succession was however liable to modification if the legal heir was unsuitable for any reason.

---

1. MacDonald, Duff, Africana. Vol. 1. p. 189.

2. Werner, A., Native Races of British Central Africa  
op cit. p. 259.



## CHAPTER IV

### COURTS

Various societies have special buildings or huts which are preserved for the pronouncement of the law. In Malawi societies, there was nothing like a Town Hall or the Old Bailey. Courts were held under a well shaded tree to give shelter from the fierce rays of the sun; sometimes, during the rainy season, courts were held in a hut. W.P. Johnson stated that lack of stately court buildings, was owing to the general poverty and to other disintegrating causes.<sup>1</sup> This statement is not however strictly correct as it was the custom of Malawi societies to meet in the open air, often termed Bwalo. These courts played a very important part in the social life of the villagers. Johnson remarked that everywhere the people seemed to have taken a special interest in their law suits. "From Mbanga Bay to Ilela they are even fond of coming down with their children and their goats to spend a day or more in hearing any cause celebre."<sup>2</sup> It has been stated

---

1. W.P. Johnson, Nyasa the Great Water 1923, p. 23.

2. Ibid., p. 25.

that due to distances between districts and to bad communications it was necessary for the people interested to go to courts which were located far from their own areas to carry some provisions. But one wonders whether relations of the defendants would also not carry some goats with them in order to get ready should a heavy compensation be required by the Court hence the reasons for carrying of goats as mentioned by Johnson. The Court not only represented a place where the law was pronounced; it was also the local newspaper, the theatre and the fashion house. Thus, if a group heard that a man was considering a divorce, his complaints would be received with ridicule among the villagers, especially if it was common knowledge that the wife cooked well, farmed well and bore children. On the other hand, he would get an encouraging push from the 'local newspaper' if the wife was known to be lazy, sterile and thoroughly incompetent.

Most discussions in Malawi communities, whether legal or not often took place in Bwalo. Most of these discussions were informal. Probably it was this informality which caused Read in her work on the Angoni to say

that the term "court" was misleading.<sup>1</sup> As stated above, the term for "court" is often referred to among the Malawi as Bwalo, but literally meaning the open space in front of a big tree, if any. The discussion was among a group of senior men called together by the headman on a verandah or under a big tree in order to settle disputes and hear complaints. No formal records were kept; there was no clerk, but contrary to the views of Read there was a summing up and pronouncement of judgment.<sup>2</sup> By the fact that the proceedings consisted of an informal discussion, it would seem that the term Bwalo would not be regarded as a Court in the eyes of non Malawi people. But among the Chewa,<sup>3</sup> and many other tribes, the Court hearings of most cases could be held in the Bwalo and as the proceedings were definitely formal, it seems that Bwalo should be looked upon more as a court than as an open space. But the main issue here is whether the Bwalo should not<sup>be</sup>/regarded as a

- 
1. Read, M., The Angoni of Nyasaland, op. cit., p. 92.
  2. Read, M., The Angoni of Nyasaland, op. cit., p. 92.
  3. Rangeley, W.H.J., "Notes on Chewa Tribal Law", op. cit., p. 10, In Nyasaland Journal.

"Court" merely because the proceedings were informal. It is submitted that it should indeed be regarded as a Court, for though the deliberations seemed informal, they were regarded as binding by the people. Indeed, Read follows up her remarks earlier by saying that 'the Ngoni nevertheless always recognized those "Courts" at the village level as an integral part of their system.<sup>1</sup> Moreover, if one conceived of a "Court" as "any sitting at which disputes are settled and the equilibrium of the community is restored by its accredited functionaries"<sup>2</sup> would it then matter whether such sitting was formal or informal? The importance of the Bwalo was that the decisions were binding on all parties involved. It is also interesting to note that the decision to take Mwavi was also given sometimes in the Bwalo, although the victim was usually kept in a closed or secret place while taking the mwavi.<sup>3</sup> But sometimes he might take it at the Bwalo itself. Among many societies in Malawi notably the Chewa and Ngonde justice was free,<sup>4</sup> in that everyone was expected to be heard in these courts of law.<sup>5</sup>

All members were equal in social as well as in their legal status. Read noted that the Ngoni tribe asserted the principle of equality before the law, that is, one law for all

- 
1. Read, M., The Angoni of Nyasaland, op. cit., p. 94.
  2. Elias, T.O., The Nature of Customary Law, op. cit., p. 39.
  3. Gamitto, A.P.C., King Kazemse, op. cit., p. 104.
  4. Wilson, G., The Constitution of the Ngonde, op. cit., p. and Rangeley, N., "Notes on the Acewa Tribal law", op. cit., p.
  5. Read, M., The Angoni of Nyasaland, op. cit., p. 94.

people. This principle comes close to the English law, but one should note the position of the Diplomatic Representative, Trade Unions, Corporations and the Crown, who enjoy legal advantages not possessed by ordinary citizens. Although these bodies did not exist in Malawi societies, there is no written evidence to deduce that they would have enjoyed a special privilege. To this view Heckel remarked that the authorities were only exempted as far as it is required by their office.<sup>1</sup> Again, Livingstone mentioned that a Chief was not exempted from taking Mwavi when he had committed a wrong in his personal capacity.<sup>2</sup>

However, it may be his supported by scattered evidence e.g., that a chief may be punished by his people for having committed adultery with an ordinary citizen's wife and even that of a slave.<sup>3</sup>

It has been observed that the principle of equality before the law was so ingrained in the society that they were frequently recited by the Ngoni. There are instances where Ngoni chiefs, who, when in open court, might have awarded heavy compensation against their sons, remarking that the law was no respecter of persons.<sup>4</sup>

#### COMPOSITION OF COURTS

MacDonald, writing on the Yao, declared that the president of the court was a chief.<sup>5</sup> There is evidence that this was

---

1. Heckel, B., The Yao Tribe, p. 37.

2. Livingstone, David and Charles, The Zambezi and its Tributaries, op. cit., p. 120.

3. Livingstone, or interview

4. Interview - Chief Chakhumsila.

5. MacDonald, Duff, Africana, op. cit., Vol. I, p. 154.

the position among many other social groups in Malawi. Indeed, this was so in almost every organized society in Malawi. The chief was assisted by Court advisors or important people of the court - "Akulu Apabwalo". Among the Ngoni, he was assisted by "Nduna",<sup>1</sup> among the Ngonde by the "Makambala",<sup>2</sup> and by the Aphungu among the Nyanja<sup>3</sup> who were appointed and dismissed by the chief. However, they could only be dismissed by him in regard to their dealings of a particular case in court, and for that particular case only. The position of Ankhoswe and the Makambala was not hereditary, but that of Nduna was hereditary among the Ngoni. In a few cases children of a deceased Ankhoswe and the Makambala were appointed.<sup>4</sup>

Regarding the function of the Ankhoswe, Makambala and Nduna, the question arises whether their position was that of judges or similar to that of the jury. It must be added that it is only recently that the Chewa held cases in the absence of the Chief; before that period they never had the right to do so. With the constant absence of the chief from his domain, the Ankhoswe came to hear cases alone and the head Ankhoswe would sit as the president of the court.<sup>5</sup>

- 
1. Read, M., The Angoni of Nyasaland, op. cit., p.
  2. Wilson, G., "The Constitution of the Ngonde", op. cit., p.
  3. Report of the Enquiry of the Commission Appointed to Enquire into Financial Position and Further Development of Nyasaland, op. cit., p.
  4. Interview with Mwakasungula.
  5. Rangeley, L.H.J., "Notes on Cewa Tribal Law", Vol. I, N.O. III, 1948, op. cit., p. 11.

Although the chief could not hold a court without his Ankhoswe, the head Ankhoswe could, in the absence of the Chief, conduct the case for the court and generally ask any questions necessary from the witnesses. The other Ankhoswe might also ask questions. The head Ankhoswe summed up the case on behalf of the other Ankhoswe who gave the verdict.<sup>1</sup> It would seem from the proceeding that the Ankhoswe were judge and jury and indeed counsel at the same time. However, there does not seem to have been the relationship of barrister and solicitor among them.

These Ankhoswe, Makambala or Nduna were not only judges of fact, but also of ~~the~~ law, and in their summing up, the head Ankhoswe dealt with all the relevant principles of law. Thus it appears that the Ankhoswe, Makambala or Nduna were more than just a judge or jury, but that they were also advisors and assessors.

The chief alone awarded the order of the court, sometimes without necessarily consulting the Ankhoswe.<sup>2</sup> If this was the case, it is of great significance to note that if the Ankhoswe were not satisfied with the order of the

---

1. Ibid., p.

2. Ibid., p. 12.

chief, they could demand that judgement should be postponed until they had talked it over with him.<sup>1</sup> What is evident here is that the Ankhoswe were concerned with communal justice and conformity with custom and opinion of their community. When they acted as judge and jury they only acted as custodians of the customary law.

MacDonald noted that the village elders held court whenever there was a need for it. But the more serious offences such as treason and murder, were tried by the chief in his own court.<sup>2</sup>

It seemed that Ankhoswe were composed of men only, except in matrilineal societies, where a chief, sub-chief, or village headman could be a woman.<sup>3</sup> Also the wife of a man serving on the Ankhoswe could take over his functions, if authorised by the husband. The female heads of these communities had considerable authority, but were usually assisted by the male Ankhoswe if the affairs were of a public nature.<sup>4</sup>

---

1. Ibid., p. 11.

2. MacDonald, Duff - Africana, Vol. I, op. cit., p. 172.

3. Livingstone, David and Charles, The Zambezi and its Tributaries, op. cit., pp. 92 and 108.

4. Interview with R. Katengeza.



### The Chief

Any study of African law must include discussions of certain social and constitutional strata; it will be convenient to begin with the position of the Chief, and the importance of his position will be understood when his status is discussed with regard to the different tribes.

Among the Yao, he was supreme executive of the law and hence he symbolized its highest court of appeal.<sup>1</sup> It has been recorded, with the exception of the mwavi ordeal, that in practice his position was easily discernible in areas where his influence was strong, and that in remote villages he might lose his preferential status to a stronger headman.<sup>2</sup> Such a situation arose because the chief was highly inaccessible to the masses, except in case of dire national crisis, like tribal war or when the people went to him for appeals.

The chief was supported by the village, and each headman was responsible for the administration of the

---

1. MacDonald, Duff, Vol. I, p. 158.

2. Werner, A., Native Races of British Central Africa, op. cit., p. 261.

village under him. The Chief was also supported by the village elders of outstanding legal and political ability including his matured relations. These composed the Parliament or Council<sup>1</sup> of a particular area. It was noted by Stannus that the Chief's sons and brothers could be made headmen.<sup>2</sup> This would be a form of nepotism.

A despotic rule flourished among the Makololo chiefs who had no organised council. The Makololo's rise to chieftaincy in Malawi was ensured by the arrival of David Livingstone who brought them to Malawi from Bechuana-land and made them militarily strong in order to protect the Manganja tribe, who were being heavily attacked by the "Yao coming from the East and Ngoni coming from the West".<sup>3</sup> The consequence was that the Makololo became despotic chiefs over their own people, and over the Manganja tribe whom they were supposed to protect.

Among the Chewa, the chief possessed the important power of appointing and dismissing advisers of the court, either for having mishandled a case in court, or

- 
1. MacDonald, Duff, Africana, Vol. I, op. cit., p. 154.
  2. Stannus, H.S., "The Wayao of Nyasaland" Havard African Studies, Vol. III, 1922, op. cit., p. 296.
  3. Johnston, H.H., British Central Africa, op. cit., p. 66.

for being guilty of bribery.<sup>1</sup>

Among the Ngoni, there was a strict observance of the law, for example, on both sides of the chair of the Paramount Mbelwa the words "Justice is Blind"<sup>2</sup> are inscribed to remind the Paramount of his duty towards the people, signifying his acceptance of the theory and his willingness to carry out justice accordingly. Therefore, every applicant who comes to the Paramount ought to be assured of fair treatment.

The position of Yao chiefs was aptly described by MacDonald in the following passage:-

"The Chief is called "Msiene Chilambo"  
i.e. the owner of the territory," and  
has supreme power over everyone that  
dwells within his domain."<sup>3</sup>

Therefore all those under his domain, could expect to be heard by him. Werner remarked that the chief's powers were not despotic, although this is not quite correct as

- 
1. Rangeley, W.H.J., "Notes on the Cewa Tribal law", Nyasaland Journal, Vol. I, No. 3, 1948, op. cit., p. 11.
  2. Personally witnessed in 1961.
  3. MacDonald, Duff, Africana, Vol. I, op. cit., p. 154.

has been noted among the Makololo. "The Chief", wrote MacDonald in 1881, "may often have less influence than powerful headmen, and we have known cases where he contented himself with grumbling when his headmen acted contrary to his desire."<sup>1</sup>

The chief was not expected to take vital decisions on his own without consulting his headmen, who generally represented the views of the tribe, and he very rarely disregarded their opinion, although he could sometimes do so among the Chewa. The chief relegated considerable authority to each village headman, although his own power was supreme. As Duff asserted, centralization was not possible due to large numbers of chiefdoms, each supreme in its own area.<sup>2</sup>

Livingstone noted the solitary exception of a woman chief in the Upper Shire Valley. Sebituane, the Makololo chief, who appointed his daughter as his successor, 'probably' says Livingstone, 'in imitation of some of the negro tribes with whom he had come into contact.'<sup>3</sup> She,

- 
1. MacDonald, Duff, Africana, op. cit., Vol. I, p. 154.
  2. Duff, H.L., Nyasaland Under Foreign Office, op. cit., p. 193.
  3. Livingstone, David and Charles, Zambezi and its tributaries, op. cit., p. 92.

however, soon resigned what proved a distasteful position, for her father was unwilling that she should transfer her power to a husband, therefore he directed her not to marry but to contract any number of temporary alliances. Thus it would seem that the Makololo, who were foreigners in Malawi, had once practised polyandry but this had no effect in Malawi, neither was it popular among themselves.

It should be pointed out that a slave who was made a chief could not rise to the rank of paramount. The highest he could attain was to be a village headman.<sup>2</sup> Therefore, in most cases his elevation, which was a gesture of reward from the paramount for his achievements during war, would merely be that of a headman over the people conquered by the chief, who were assigned a vacant place within the territory. He might also be a headman over the ordinary citizens in the chief's territory if this was the chief's desire. The point, which should not be overlooked is the fact that a slave could seldom be a paramount with sovereignty over the people, as this would entail the complete overthrow of the rightful and original paramount, which is contrary to Malawi customary law. Perhaps such a

---

1. Ibid., p. 92.

2. MacDonald, Duff, Africana, Vol. I, op. cit., p. 145.

situation where a slave was elevated as the highest head of a society would have occurred in societies lacking a chief and where "might" was regarded as essential to the position of a chief.

One wonders whether the chief's position was identical with that of the monarchical system or the presidential system. There is no adequate material to clarify the position. It is argued that chieftaincy approximates more closely to the presidential system since the chief took an active part in the government of his country, if we ignore the areas where he had little influence. Elias asserted that a higher chief who exceeded his legitimate powers and proved unamenable to discipline (of his cabinet) might be deposed, or was sometimes asked to commit voluntary suicide, or was put to death by the unanimous verdict of public opinion.<sup>2</sup> It may also be added that an examination of the chief's power under the Constitution of the Court and Appeal strengthened the view that the chief's position was closer to that of a president

- 
1. Werner, A., Native Races of British Central Africa, op. cit., p. 274.
  2. Elias, O.T., The Nature of Customary Law, op. cit., p. 99.

rather than that of a constitutional monarch.

Among the strictly patrilineal Ngoni, one would have thought that it would have been easy to formulate rules for the succession to the paramountcy and that the rules would have been rigidly adhered to, but this was not the case.

An element of popular choice in the appointment of Inkosi, i.e. paramount or at least of a popular verdict in favour of, or against a proposed candidate has been detected.<sup>1</sup>

The possibility of nomination of his heir by the dying paramount was also suggested, but one wonders whether the wishes of the dying chief were respected; this would suggest that the office was not strictly hereditary. It is said "not strictly" because, one of the principles of succession which determined the choice of the new paramount was that he should come from the big house; either the son of the dead paramount or his "adopted" son if there was no apparent heir. There was no automatic succession as would be expected in a normal hereditary succession. The practice of the Ngoni was that "on the death of a paramount, and the person of the heir-elect and also of the funeral

---

1. Read, M., The Angoni of Nyasaland, op. cit., p. 56.

rites of the dead paramount. The provision for a Regency allowed for a period of delay before announcing the successor". The office of the paramount was clearly in suspense during this period. Read remarked that during this period the regent was responsible for carrying on the work of the paramount and for consultation with heads of leading clans about the successor. "The assumption of authority by a Regent and the provision for an interregnum make it clear that the identity of the successor was seldom a foregone conclusion, even though the heir apparent stood with a spear at his father's grave".<sup>1</sup>

As in the case of the Ngonde, suitability was another vital principle in the choice of a new paramount, that is, the character and personality of the proposed successor. This was discussed by the regent and his leading elders. It was certain that when the regency ended, the regent summoned the people and presented the heir as the new paramount. The absence of automatic choice, the requirement of suitability and the endorsement at least of the heir by the regent and his leading men, all indicated the strong possibility that the late paramount's son might

---

1. Ibid., p. 56.



in some circumstances not be chosen. This could arise, if the son was insane or if he was disliked by the community as being of weak character.

The system under the Ngonde though clearly hereditary, had a rather complicated system of hereditary chiefs who took the name Kyungu, in that though he was a rightful heir he was not chosen unless successful in his election.

#### The Village Headman

The headman, enjoyed a closer relationship with the people, as he was a spiritual and social head, in addition to being their official headman, and this can be seen of Mponda village where a headman leads a funeral procession to the grave-yard,<sup>1</sup> thereby signifying that the dead belonged not only to the bereaved family, but also to that community under his headship, an act endearing him all the more to the villagers, and serving to strengthen the relationship between him and his community.

The Headmanship had great political and legal significance. He was responsible for the administration

---

1. Interview with the Rev. Chipembere.

of his village, and he carried out the orders and wishes of his chief. MacDonald stated that the headman acted as an intermediary between his villagers and the chief, and acted as a spokesman on behalf of his people. The headman also presided over the village court. He was expected to participate in meetings of great importance for the security of the entire tribe. Before going to war the matter was discussed by the Council-in-Chief, because if war was declared, all village headmen followed their chief, even if some of his decisions were not practicable.<sup>1</sup> The political status of the headman was not overshadowed by the chief. The headman's control over the manpower of his village was important for defence. Among the Tonga Van Velsen notes that the headman who could offer safe living conditions presumably would attract more followers than a weak headman.<sup>2</sup> Before the introduction of Principal Headman in 1912,<sup>3</sup> the headman had to be a close relative of his predecessor, either his own son

- 
1. MacDonald, Duff, Africana, Vol. I, op. cit., p. 157.
  2. Van Velsen, J., The Politics of Kinship, Manchester University Press 1964, p. 293.
  3. See Chapter I, Part Two of this study on the discussion of Principal Headman.

as is the case in patrilineal society or the son of his own sister among matrilineal societies. His personality was very important. The first requirement seemed to be that the headman should have a peaceable disposition, for he settles all village cases, usually with the assistance of the village elders or heads of the families who were called younger brothers.<sup>1</sup> If members to any action were not satisfied with his decision they appealed to the chief, this being the highest Court of Appeal, except when Mwavi was resorted to. Among the Yao it was noted that the principles of strict liability of the village headman to the villagers were extremely rigid.<sup>2</sup> This is in contrast to the principles of international law, where such a situation in international law occurs only when the wrong done is against a citizen of another state, and not within the state itself.<sup>3</sup> In many legal systems a wrong done by a citizen, which is a breach of the municipal law, would be borne by the wrong-doer himself, except in cases of strict liability, such as in the cases of parent and child, employer and employee, but not the head of a city as e.g.

---

1. MacDonald, Duff, Africana, op. cit., Vol. I, p. 156.

2. Ibid., p. 154.

3. Briery, J.L., The Law of Nations 1963, pp. 284-5.

a mayor, as it is in the case of a headman in Malawi.

In most cases headmen who could also act as court advisors were selected at the court itself for their experience in that particular litigation.<sup>1</sup> It was hereditary among the Ngonde that a son of a court nobleman who acted as advisor to the juryman, could also be selected after his father, if he could demonstrate his wisdom in court affairs, and thereby becoming one of the Makambalas.

It should also be noted that the functions of the Ndunas or village headmen were not confined to the courts alone. He might be asked to settle some petty disputes, with the consent of the parties. But family matters were usually settled by the elders of the family, uncles and grandfathers or a mkoswe in marriage matters among the Nyanja, Lomwe and the Ngoni. But in some cases they were able to settle family matters of the Chief.<sup>2</sup>

---

1. Wilson, G., "The Constitution of the Ngonde", The Rhodes-Livingstone Papers, Livingstone Northern Rhodesia 1939, p.70.

2. Mitchell, J.C., The Yao Village, op. cit., p. 93.

## Procedure

Among the Yao, a chief was formerly the adjudicator of all disputes, and dispenser of justice in all crimes.<sup>1</sup>

The headman among the Ngonde was in the same position as the chief with regard to matters affecting his village.<sup>2</sup>

Cases were heard by the chief sitting in court, usually in the Bwalo together with the village headmen, who acted as the Nduna. Cases were here stated at a great length if they were grave crimes.

Evidence was given without oath but cases were not decided on their testimony.<sup>3</sup> Apart from the chiefs each headman held court for his own people, but if either party was not satisfied that justice had been done, then they could appeal to the chief. Cases taken to the chief's appeal court, among the Ngonde, could not be "reopened in a mundane way!"<sup>4</sup> This however could be so only in cases against a chief or some important headmen. But cases

1. MacDonald, Duff, Africana, Vol. I, p. 154.

2. Wilson, G., "The Constitution of the Ngonde," op. cit., p. 70.

3. MacDonald, Duff, Vol. I, p. 159,

4. Wilson, G., "The Constitution of the Ngonde," op. cit., p. 49.

between ordinary men would be re-opened at the Kyungus court.<sup>1</sup>

At the chief's appeal court, the chief, the Ankoswe and the village elders - in short, the tribal council - took their seats in the bwalo and if it was a celebrated case the whole village and villagers from afar were also assembled.<sup>2</sup>

Among the Yao, the procedure followed, was that the complainant spoke first, then the accused, and finally the various members of the council gave their opinions.<sup>3</sup> The decision was given on a majority opinion. This method was different from the English method of procedure in that innocent or guilty was determined by a unanimous decision especially so in criminal cases. Read notes that this procedure was varied among the Ngoni; when the court assembled, the plaintiff was called the owner of the case, the witnesses were those present at the time of the quarrel who might have direct or circumstantial evidence to the case.<sup>4</sup> As in English law, the Ngoni witness was warned to tell the truth without fear or bias. He was also advised

---

1. Ibid., p. 49.

2. Johnson, W.P., Nyasa the Great Water, op. cit., p. 25.

3. Werner, A., Native Races of the British Empire, op. cit., p. 262.

4. Read, M., The Angoni of Nyasaland, op. cit., 1956, p. 93.

not to support any side but to state facts relevant to the matter. The court also appealed to the public to bring any relevant evidence, if they had heard or seen anything in relation to the case. This was "to ensure that justice was done, so restoring equilibrium and good feeling in the village".<sup>1</sup>

During the period of Gamitto the Tumbuka and the Chewa, adversaries appeared separately; and at the sight of each other they started fighting again. When the chief pronounced judgement, adversaries heard it separately and occasionally obeyed. The adversaries never saw each other until the judgement was obeyed and fine paid. Occasionally fighting started again and the penalty was increased.<sup>2</sup>

### Mwavi Trial

Mwavi trial is discussed under procedure and not under classification of wrongs as would have been expected; for writers such as Elmslie and Gamitto considered trial by mwavi as a wrong in itself. But as it was one of the forms of trial among the Malawi's it is necessary to discuss

---

1. Ibid., p. 93.

2. Gamitto, A.C.P., Vol. I, p. 148, King Kazemse.

it under procedure.

It is believed that "Mwavi" poison ordeal originated from the Tonga and the Tumbuka in the Northern province of Malawi. When the Ngoni settled among these people, they were constantly using it.<sup>1</sup>

In order to prove one's innocence, family and other local disputes were settled by the Mwavi ordeal, which was the last court of appeal. The heads of the families including the chief had no power over this court, except the diviner. Hence power of the diviners in litigation were sometimes more important than that of the chief of the area.<sup>2</sup> A husband might come to find a crowd at his door only to learn that his wife had taken mwavi.<sup>3</sup> It seems that once an accusation had been made against anyone, it was not possible for that person to appeal to a chief and had to take mwavi at once or run away.<sup>4</sup> Mwavi, therefore, deprived the victims of appeals to the chief or paramount. Among the Mang'anja, as was the case

---

1. Elmslie, W.A., Among the Wild Ngoni, p. 64.

2. MacDonald, Duff, Africana, Vol. I, op. cit., p. 173.

3. Elmslie, W.A., Among the Wild Ngoni, p. 65.

4. Ibid., pp. 65-66.



with many Malawi tribes, once the victim vomited the mwavi, he was deemed to be innocent. The Mang'anja chiefs - as was among the Ngoni - were not excepted from taking mwavi once they were accused.<sup>1</sup>

When mwavi was taken, death generally took place immediately<sup>2</sup> especially in cases of overdose and an infant was killed by an average dose of mwavi.<sup>3</sup> Infants were not exempted from taking mwavi when a wrong was committed.

The medicine-man's payment consisted of the items taken from the dead man's body.<sup>4</sup>

Among the Ngonde, it is believed "Great Chiefs alone had power to administer the mwavi" also a few territorial nobles.<sup>5</sup> Apart from the legal significance of Mwavi, this procedure was also highly religious. It was an appeal beyond human justice. That is why it was in some cases not possible for the chief to refuse to take

- 
1. Livinstone, David and Charles, Expedition to the Zambezi and the tributaries, p. 3.
  2. Stannus, H.S., Notes on the Tribes of British Central Africa, p. 205.
  3. Werner, A., Native Races of British Central Africa, op. cit., p. 172.
  4. Stannus, H.S., Notes on the Tribes of British Central Africa, 1910, p. 305.
  5. Wilson, G., Constitution of the Ngonde, Rhodes-Livingstone Papers, 1939, p. 58.

mwavi when found wrong.

The defendant who had to undergo this ordeal was in many cases shut up in a nyumba, i.e. a hut. He had nothing to eat from the day on which judgement was to be passed until the mwavi test took place. He was watched with considerable care throughout this period.<sup>1</sup>

Before the defendant took this oath, he said - "If I have committed such a mlandu, i.e. a crime, then the mwavi will prove it." As stated earlier, he vomited the mwavi or passed it out; thus his innocence was proved and he received indemnity from the plaintiff. If he died, he was presumed guilty.

### Diviner

Another important legal position was that of the Diviner or medicine-man. His position does not seem to be of legal importance, in other matters other than litigation and he was more important where he was selected to attend to some important patients, for example, a headman, chief or paramount.<sup>2</sup> Legally speaking his position was

---

1. Gamitto, King Kazembe, Vol. I, op. cit., p. 104.

2. Elmslie, W.A., Among the Wild Ngoni, op. cit., pp. 60-61.

weakened if he gave wrong information to either party to a litigation or a wrong diagnosis to a patient and if such information proved to be wrong, through mwavi, he would have to answer to the chief and may have to compensate the wrongly accused party.<sup>1</sup> A woman's position was enhanced if recognized as a Diviner.<sup>2</sup>

It seems that the diviner filled the role of the police-detective. The use of the diviner to discover who was probably guilty is certainly close to the theory of criminal investigation<sup>3</sup> and subsequent charge by the police. Indeed MacDonald notes that although the sorcerer derived his evidence from ordinary sources, including other agents, he still preserved his integrity and power so that he may be feared, thus his service was still found indispensable by the people,<sup>4</sup> because the diviner often proved correct. But in most cases he employed secret agents to investigate the matter for him.<sup>5</sup>

- 
1. Werner, A., The Native Races of British Central Africa, op. cit., p. 60.
  2. Duff, H.L., Nyasaland Under Foreign Office, op. cit., p. 321.
  3. Elmslie, W.A., Among the Wild Ngoni, op. cit., p. 63.
  4. MacDonald, Duff, Africana, Vol. I, op. cit., p. 207.
  5. Livingstone, David and Charles, The Zambezi and its Tributaries, op. cit., p. 51.

## WITCHCRAFT

When a man got ill - and suspicion had not befallen on anyone - the question was not how he was to be cured, but who bewitched him or what evil spirits had moved against him and why. Because of such beliefs people were accused without grounds and such accusations sometimes led to the drinking of mwavi to prove their innocence which sometimes resulted in their death.

Wicked people, sometimes even chiefs, and sometimes the headman<sup>1</sup> made use of witchcraft and groundless accusations to remove any person they disliked or whose possessions they wanted to retake from the village as his innocence could only be proved by mwavi. But this was not always the case because an accused could still die of mwavi poison, although he himself was innocent. It is also doubtful whether the amount of mwavi powder used was always the same. It would seem that, that was not the case. As some accusations were groundless, it appears that some medicine-men could have been bribed by the accuser to make certain that the accused met his death<sup>2</sup> and indeed the

---

1. Elmslie, W.A., Among the Wild Ngoni, op. cit., p. 60.

2. Duff, H.L., Nyasaland Under Foreign Office, op. cit., p. 321.

medicine-man would seem to have no objection to such arrangements as he would be certain of his payment. Above all, the medicine-man would be more popular among cruel accusers, thus inviting more customers.

In many cases, most offenders were punished by payment, i.e. compensation. But there were certain cases such as treason, committing adultery with the chief's wife which were serious charges and the punishment was death.<sup>1</sup>

The Yao chief Mponda-of Fort Johnston - and who was one of Johnston's great enemy, had a different practice towards his offenders; in his case, they were usually shot dead. Anyone committing adultery with any of the chiefs' wives was taken to Mponda's court and his neck was cut off on the spot and in public.<sup>2</sup> It is not surprising that Mponda found it easy to shoot his criminals, as he was a great friend of the Arabs who supplied him with guns which he seems to have made use of whenever he wished. Compensation was given to the relations of the dead man by the relations of the murderer.<sup>3</sup> Sometimes slaves were

---

1. Wilson, G., "The Constitution of the Ngonde," op. cit., 1939, pp. 48-49.

2. Stannus, H.S., Notes on some Tribes of British Central Africa, (1910) op. cit., p. 291.

3. Elmslie, W.A., Among the Wild Ngoni, op. cit., p. 59.

used as sources of compensation to the deceased relatives in order to help the deceased's widow or widows or other relatives until their children were married.<sup>1</sup> This is so because goods received as compensation might not be used for food or clothes, this being the blood money. Hence the prisoner or slave substitute had to do productive work to maintain the murdered man's property and family.<sup>2</sup>

Detection of a guilty party by means of magic and proof of guilt or otherwise by ordeal poison were dealt with everywhere.<sup>3</sup> Taking goods by false pretences was not a crime under the Yao law. It was said that it was only fair game and that a man was to be intelligent enough not to allow himself into such tricks.<sup>4</sup>

### Criminal Cases

In practice, this referred to all crimes and civil cases among Yao, including murder and adultery and procedure was the same. When a theft had been committed

- 
1. Interview with Chief Chakhumbila.
  2. Ibid.
  3. MacDonald, Duff, Africana, Vol. I, pp. 163-164.
  4. Stannus, H.S., "Notes on the Tribes of British Central Africa," op. cit., p. 292.

without suspicion falling upon any particular person, the diviner was consulted and a person was often pointed out by the diviner; the accused was then brought before the Court<sup>1</sup> where the prosecutor demanded restitution from the defendant. If the accused pleaded not guilty, he offered to drink mwavi poison to prove it, and either he or his friends could demand this ordeal for him, but his friends never demanded it unless they believed him innocent, because if he died after drinking the mwavi, they ran the risk of having to pay the full value of the goods. If guilty, rather than drink the poison, a man would prefer to confess and make restitution. Restitution was not always ipso facto, as a guilty man could be made to pay a fine or be handed over as a slave to the wronged person. If a party survived the mwavi, his accuser had to pay him a fine and the diviner was assumed to have been mistaken. A second diviner would be called, but the man just acquitted could not be pointed out again.

It is submitted that the "mlandu" procedure was legal in character in the sense that it conformed to the

---

1. Werner, A., Native Races of British Central Africa, op. cit., p. 263.

"laws" of the society, thus discovery by the diviner was universal and handed down to later generations.<sup>1</sup>

The Yao were emphatic that mwavi could only be administered to a person under suspicion.<sup>2</sup> In English law, only when there is reasonable evidence as to the person's guilt can he be arrested and put on trial. And that the diviner could not point out the same man just acquitted is reminiscent of the English rule - autre fois acquit - i.e. no one should be tried twice for the same case.<sup>3</sup>

In Chewa law, the term "mlandu" was used for a "case," though strictly it had a far wider meaning.<sup>4</sup> - In its narrower meaning it seems that unlike the Yao, the court procedure did not differ irrespective of whether the case was criminal or civil. Though trial by mwavi was often used, it does not seem to have been used as often as among the Yao.<sup>5</sup> The normal procedure in a case among

- 
1. Elmslie, W.A., Among the Wild Ngoni, op. cit., p. 62.
  2. Stannus, H.S., op. cit., 1910, p. 303.
  3. Wilshire Criminal Procedure, ed. Palmer, H.A., and Palmer, Henry. Sweet and Maxwell, p. 82.
  4. Rangeley, W.H.J., "Notes on Chewa Tribal Law," Nyasaland Journal, Vol. I, No. 3, 1948, p. 11.
  5. Stannus, H.S., op. cit., 1910, p. 303.



the Chewa differed in the sense that there was no evidence that divination was strongly used as a method of detection of the suspect.<sup>1</sup> By the time a case reached the chief's court, it had been thoroughly talked over, perhaps several times. In the chief's courts, the village headman or the plaintiff himself introduced the case by describing it from his knowledge of it. The complainant then told his story, even if the case was introduced by the village headman. He told the case without interruption and when he had finished the defendant related his story, either admitting or denying the complaint.<sup>2</sup> Even if the defendant admitted the complaint, the plaintiff had to relate his own story to enable the Court to be acquainted with the facts. After the two parties had spoken, either side could call witnesses. The head Ankhoswe and any other Ankhoswe who wished, could ask questions of the witnesses. He then summed up not invariably on behalf of the Court and he gave the verdict to the chief. The chief alone gave the award of the Court - lipo (damages in the form of money,

---

1. Rangeley, W.H.J., Notes on Chewa Tribal law, op. cit., p. 66.

2. Ibid., p. 11.

goats or cattle) or dismissed the case.<sup>1</sup>

The following were the main forms used for ordeal trial. There were three kinds of known forms:-

- (i) by boiling water;
- (ii) by putting a pin through the lobe of the ear of the man accused of stealing; should blood appear and the man showed sign of pain, he was guilty;
- (iii) by poison,<sup>2</sup> i.e. mwavi.

It seems though that mwavi poison was more used than any of the above listed by most tribes in Malawi.

Among the Ngonde, treason against Kyungu, i.e. the chief, was summarily punished with little or no legal argument. Too intimate a relationship with Kyungu's wife was treason, although wives were closely guarded, especially those of Kyungu. Traitors were thrown down the hillside and members of the traitor's family were enslaved. In addition, criticisms against Kyungu<sup>3</sup> was treason and was heavily punished. If a man looked on the Kyungu's wives bathing, he would be punished by death by being thrown

1. Ibid., p. 12.

2. Stannus, H.S., Notes on Tribes of British Central Africa, 1910, op. cit., p. 305.

3. Wilson, G., "The Constitution of the Ngonde", Rhodes-Livingstone Papers, p. 939, p. 49.

down the cliff.

His relatives were sent to the Noblemen called Makambala who did and still do act as the Kyungu's counsellors they selected the best looking girls, while the others were released.<sup>1</sup> The idea of selecting the best girls on the grounds mentioned above does not seem to have any legal significance. On the contrary, it seems to be an abuse of the system in enslaving those who had wronged members of the Chief's household.

---

1. Wilson, G., "Constitution of the Ngonde," Rhodes-Livingstone Papers, 1939, op. cit., pp. 48-49.

### Appeals

Having discussed the constitution of the Courts and the law, it remains to speak of Appeals. It appears that appeals lay in all cases from the village headman to the sub-chief and ultimately to the chief.<sup>1</sup> If the plaintiff failed to get satisfaction from the chief, he could, among the Ngoni, appeal to the Paramount.<sup>2</sup> The Achewa seem to have had a much longer hierarchical system.<sup>3</sup> If a case occurred in a village within a family, the family head would first try to settle it. If it was a marriage case between two families, the Ankhoswe tried to settle it. When a private settlement was impossible, the case went to the village headman, then to the sub-chief, and if still necessary, to the chief of the area.<sup>4</sup>

Among the Tonga where the political unit was limited to the size of one village or hamlet justice was obtained by arbitration ordeal, summary reprisal or magic,

- 
1. Werner, A., The Natives of British Central Africa, 1906, op. cit., pp. 261-2.
  2. Read, A., The Angoni of Nyasaland, op. cit., p. 94.
  3. Rangeley, W.H.J., Nyasaland Journal, Vol. I, No. 3, 1948, p. 9.
  4. Ibid., p. 9.

because the traditional chiefs were not strong.<sup>1</sup> (And in matrimonial cases in a matrilocal marriage, it would seem that an unsatisfied husband only could appeal to the poison ordeal). There was no central court of appeal at Mbande, which was the centre of the Ngonde highest court of appeal, where Makambalas resided and to which the ordinary man could bring cases direct, or appeal against the decisions of his sub chiefs. Certain cases such as murder and witchcraft, would, however, initially be heard by the Paramount.<sup>2</sup>

In the matter of appeals, the African desire for continued discussion and justice was apparent. As was noted earlier, among the Chewa, before the case got to the chief's Court, it had been thoroughly talked over several times by the head of the family.

- 
1. van Velsen, J., Politics of Kinship, op. cit., p. 307, also Lord Hailey, Native Administration in British Central Africa, op. cit., p. 34.
  2. Wilson, G., Constitution of the Ngonde, p. 50. Also see Read, M., The Angoni of Nyasaland, op. cit., p. 92.

### Sanctions

Every legal system possesses its attendant sanctions. It is important not to forget that the perennial question why law is obeyed in any community is due to sanctions. Suffice it to say that there are recognised sanctions in African societies. In normal cases such a discussion is likely to begin with imprisonment. But in most African societies, there seemed to have been no widespread use of imprisonment as an indigenous institution for punishing a criminal. Talbot<sup>1</sup> writing of the people of Southern Nigeria, Yoruba of Western Nigeria discovered some use for this device. Among the Malawi people imprisonment, as stated above, was scarcely known, and indeed as Werner notes<sup>2</sup> of the Yao, it was hardly possible, because payment for fines were usually used. Hence, the nearest to it was that some criminals were sometimes detained in the slave stock till ransomed. Among the Chewa imprisonment was, in fact, never ordered; the practice was that a person could be tied up by the chief until he paid his lipo. Capital

---

1. Talbot, P.A., The Peoples of Southern Nigeria, Vol. III, Oxford University Press, p. 632, 1926.

2. Werner, A., Native Races of British Central Africa, p. 267.

punishment was not automatic with the Chewa.<sup>1</sup>

In serious cases such as murder and adultery, heavy lipo was ordered and the relatives in repeated offences of ten refused to pay twice rather than allow the accused relative to be enslaved. Theft was punished by a fine but sometimes the thief was handed over as a slave to the injured party. Restitution was often made to the injured party. Among the Chewa the thief was ordered to pay lipo to the injured party and if he was a chronic thief, he was made a slave of the injured party.<sup>2</sup> Banishment was often ordered in lieu of the death penalty. One may question whether the punishment was proportionate to the crime. Here, novels of Dickens illustrate how changeable and difficult is the concept of adequate punishment and this seems to be true of the Malawi societies.

Contempt of Court, failure to appear when summoned, rudeness or noise in Court, was an offence against the chief and the chief might order the erring person to pay lipo to the chief himself.<sup>3</sup>

---

1. Rangeley, W.H.J., "Notes on Chewa Tribal Law," op. cit., p. 18.

2. Ibid., p. 18.

3. Ibid., p. 13.

## PART II

### CHAPTER V

#### Establishment of Courts of Justice in Malawi.

Before Malawi was declared a British Protectorate in 1891, the customary Courts of Malawi, or Bwalo as they were sometimes termed, administered Malawi customary laws. Bwalo has been defined in Part One of this study as a place not only where law was pronounced, but also an important place of social gatherings, which was indeed the theatre of the village. Hearing a case in such a gathering provided the "newspaper" of the day. The laws administered in these Bwalo gatherings were not flexible and the defendants or accused, sometimes lost their cases due to certain defects in the procedure, such as lack of written evidence, and the fact that sometimes the complainants had already established their cases with the courts, in that they had already given their evidence in the absence of the defendants. For the defendants it was always difficult to obtain witnesses to support their cases as there was generally the danger of these witnesses who supported the defendants being attacked by the plaintiffs. Again, the danger was apparent when the defendant



asked to take mwavi in order to prove his innocence but did not survive the mwavi, as in this case the witnesses were presumed to have known that the defendant was guilty, and although they were not liable in court, they could still be attacked by the complainants out of court.

Another problem facing the customary Courts in Malawi was the uncertainty of the laws, thus the same offence might be regarded as serious by one court while in another court it would be considered as being a trivial matter. This depended on the attitude of the court and the chief, thus at Kyungu's Court in Karonga, all cases of adultery committed with the wives of the chief were considered as treason cases and the adulterer was put to death,<sup>1</sup> and this was also the case at Mponda's Courts in Fort Johnston.<sup>2</sup>

These difficulties in the Court procedure were the causes of injustice, mostly affecting the defendants whose only last hope was to offer to take mwavi and where their chances of surviving the ordeal were remote. Hence it is correct to say that sometimes the courts gave wrong

---

1. Wilson, G. "The Constitution of the Ngonde". p. 49-50.

2. Interview with Chief Mponda.

decisions to defendants who should have been set free. Thus it would be accurate to say that the customary courts of Malawi had established rules of law<sup>1</sup> but in which the rules of equity were largely absent as was the case in English Courts before the administration of law and equity was fused by the Judicature Acts 1873-5.

When the British Protectorate was established, it was felt that changes in the customary courts procedure were necessary in order to administer justice. By 1892 courts were established in certain towns of the Protectorate, such as Blantyre, Zomba and Ekwendeni. These courts were known as Consular Courts, presided over by Europeans who were granted Warrants by the Secretary of State for the Colonies. Recommendations for the grant of the Warrants for such positions were made by Sir Harry H. Johnston, the then Consul and Commissioner General for Nyasaland Protectorate.<sup>2</sup>

The original plan was that these European magistrates in the Consular Courts were to administer justice in matters affecting British Europeans. Non

---

1. Duff, H.L. Nyasaland Under Foreign Office, op. cit., pp. 326 and 330.

2. Johnston, H.H. British Central Africa, p.114. op. cit.

British Europeans were also to be under the same jurisdiction if they were within the Protectorate and if their nations were Signatory Powers to the General Act of the Berlin Conference. The Berlin Conference Act of 1885 stated in Article 35 that "The Signatory Powers to this Act recognize the obligation to insure the establishment of authority in the regions occupied by them .... on the African Continent ... to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon".<sup>1</sup>

Among the Signatory Powers to this Conference were the United Kingdom; Prussia; United States of America; Belgium; Austria; Denmark; Spain, France; Italy; Netherlands and Luxemburg; Russia; Sweden and Norway.<sup>2</sup> As it is noted above most European nations were Signatory Powers to the Berlin Conference. Therefore, during this early period of British Administration in Malawi, many Europeans in that Protectorate would come from these nations and would be under the British juris-

---

1. General Act of the Conference of Berlin, (signed February 26, 1885,) Africa. No. 3 (1886), p. 20. London: Printed for H.M. Stationary Office.

2. Ibid., p. 12.

diction as if they were British subjects by virtue of the provisions of the Berlin Conference. The magistrates holding Warrants in Malawi had therefore jurisdiction to try cases involving these Europeans.

In addition to Warrants granted to magistrates, they also derived their jurisdiction over British subjects from the Foreign Jurisdiction Act of 1890, which stated that "It shall be lawful for the Queen to exercise jurisdiction within a foreign country in the same and ample manner as if Her Majesty had acquired that jurisdiction in a ceded and conquered territory".<sup>1</sup>

As Nyasaland came under the provisions of the Protectorates and Trust territories to which<sup>the</sup> Foreign Jurisdiction Act of 1890 applied and this Act was extended <sup>the</sup> by Central Africa Order in Council of 1892 as amended by the 1907 Nyasaland Order in Council, it follows that Nyasaland came directly under the Foreign Jurisdiction provisions. And by Section 15 of <sup>the</sup> British Central Africa Order in Council of 1902, it was laid down that "there should be a Court of Record in the Protectorate with full jurisdiction, civil and criminal, over all persons and

---

1. Changing Law in Developing Countries, edited by J.N.D. Anderson, George, Allen and Unwin Ltd., 1963, p. 20. Quoting the Foreign Jurisdiction Act of 1890.

over all matters in the Protectorate, and that such civil and criminal jurisdiction should be exercised in conformity ... with the substance of the common law, doctrines of equity, and statutes of general application in force in England on the 11th day of August, 1902, with the powers vested in and according to the procedure and practice observed and before Courts of justice and justices of the peace in England according to their respective jurisdictions and authorities at that date, ... hereafter may be, modified, or amended by or under the authority of any Order of His Majesty in Council, or by any Ordinance or Ordinance passed in and for the Protectorate".<sup>1</sup>

It is accurate therefore to say that although the missionaries and British businessmen, arrived before the establishment of British Government in Malawi, English law in Malawi, was not introduced by them. It was introduced by Orders in Council, acting in virtue of <sup>the</sup> Foreign Jurisdiction Act of 1890, and by local Ordinance passed by Nyasaland Legislative Council with the consent and approval of the Imperial Government,<sup>2</sup> such as <sup>the</sup> Subordinate

---

1. Central Africa Order in Council, 1902, S. 15.

2. Allott, A.N. Essays in African Law, London, Butterworth & Co. (Publishers) Ltd., 1960, pp. 3-4.

Courts Ordinance which created a system of courts inferior to the High Court of Nyasaland created by the 1902 British Central Africa Order in Council.

According to Johnston justice for the Africans was to be administered by the native chiefs within their jurisdictions, the reasons being that the collectors were at this time not quite conversant with the customary laws. In practice, however, the native courts were being held by British magistrates who were granted Warrants to administer justice.<sup>1</sup> Sir Harry Johnston's reasons for the extension of the magistrates' jurisdiction to African cases were that, by virtue of the treaties or agreements signed between H. Johnston himself and the African Chiefs, the Chiefs gave him the authority to represent them in the African Courts.<sup>2</sup> Thus the powers of the magistrates were in some cases extended to Africans after the signing of the treaties or agreements. In this case, however, the African seeking for justice from magistrates' courts had to show good grounds that the Chief in his area was prejudiced against him and that there would be no fair trial.<sup>3</sup>

---

1. Johnston, H.H., British Central Africa, op. cit., p. 114.

2. Ibid., p. 114.

3. Ibid., p. 154.

Indeed when the order in council stated that there should be a court of record it meant to include all persons within the Protectorate and under British protection.

But instances arose where some Africans were strangers in the Protectorate. No doubt such situations would arise in the case of the Lomwe and the Sena who immigrated from Portuguese East Africa and who did not possess any recognized Chief during their early settlement in Malawi. They also became under British Protection once accepted by the British Administration.

In some districts Chiefs were encouraged to try lesser cases in their own names. It is here important to state that this system whereby Chiefs were only allowed to try lesser cases, was the beginning of the decline of the Chiefs' legal jurisdiction over their people, for here they were allowed to try less important cases only, and even where they had the right to try such cases, their sentences were to be sanctioned by the Commissioner at Zomba. The term "Commissioner" meant the highest officer in the administration of Malawi Government, at this time being Sir Harry Johnston himself, who was also Consul-General.<sup>1</sup> In the absence of the Commissioner, the Second

---

1. The Story of Nyasaland, the Central African Archives, Southern Rhodesia, pp. 63-65. 1891-1951.

Commissioner, who was then Alfred Sharpe, was to sanction sentences imposed by African Chiefs.<sup>1</sup>

During this early period of the establishment of administration of justice, the judicial officers encountered many problems. Firstly, the warrants giving them authority to exercise their judicial powers, stated that "they were to act within their jurisdiction". This meant within their boundaries, but boundaries were not specifically defined during this period, and they were bound to deal with people outside their jurisdiction. This was as partly a result of the constant movements of the African population. Hence it was on this ground that their jurisdiction was later extended to outside their boundaries during 1890-1903.<sup>2</sup> The magistrates second problem was seen in their dealing with litigants who were not accustomed to the complex court procedure. Thus it is not surprising that many litigants came to the Courts without preparing their cases. And this multiplied the duties of the magistrates in dealing with the preliminary investigations of the cases which, could

---

1. Johnston, H.H., British Central Africa. op. cit. p. 154.

2. Duff, H.L. Nyasaland Under Foreign Office. op. cit. p. 88 but see Section 3 of Subordinate District Courts 1903.



have been settled by the parties themselves if they were acquainted with more complex forms of courts procedure. Also, the litigants came to the magistrates without sufficient evidence. In such events cases were indefinitely postponed.<sup>1</sup>

In addition, the witnesses did not feel free to give evidence in Court, because of fear of being attacked by the opposite side. It is not surprising that such fear should have arisen, as under customary law witnesses were often attacked after giving evidence in court. And it was sometimes necessary that witnesses should be hidden while giving evidence, whether in a hut near the court or a nearby tree, provided that they could be heard by the court without being seen.<sup>2</sup>

The third problem was that of the uncertainty of the customary law to be applied in the magistrates courts. This occurred when one magistrate had under his jurisdiction more than one Chief, all having different rules of customary law. Such a problem would in most cases arise in a litigation where the parties came from different tribes, each party believing that his act was

---

1. British Central African Gazette, 31.12.1899. p. 2. (A further case reported in the same Gazette, 30th June, 1901).

2. Gamitto, A.C.P., King Kazembe, Vol. I, p. 148.

not an offence under his customary law, In settling such difficulties it would seem that the aid of assessors from such tribes would be required. And although it is true to say that the Lomwe and the Sena from Portuguese East Africa rapidly assimilated themselves to any tribe to which they had settled,<sup>1</sup> such difficulties would obviously affect them as the 1902 Order in Council stating that the courts were to apply Native custom and law, where they were not repugnant to rules of equity or morality, meant the Native custom and law of the "Natives" under British jurisdiction and not those of strangers. Hence the Ordinance would exclude them until they were also accepted as British subjects when their customary law would also come under the Ordinance.

Due to the shortage of European personnel in the administration of the Protectorate in its early days, it was found necessary to give some of the judicial officials administrative duties. This class of officials was called 'Collectors,' and their tasks included the collection of customs duties. They also held the office of Post Master in their respective districts.<sup>2</sup> The

---

1. Lord Hailey, Native Administration in the British African Territories, op. cit., p. 24.

2. Johnston, H.H., British Central Africa, op. cit., p. 152.

Collectors held similar positions to those of magistrates holding judicial warrants. Thus they dealt with disputes between Europeans and Asians and later those matters where Europeans and Africans were involved, or matters involving Africans only. Collectors also dealt with the assessments of taxes paid by Africans. In addition they directed the police in their districts.<sup>1</sup>

It seems that the Collectors in the early days of the administration, acted as 'District Residents' in that they were considered as political officers during the time of Johnston. They were authorized to act in the name and by authority of the chief of the area.<sup>2</sup> It is interesting to note that this authority of the chief was not expressly granted to the Collectors to act in the Chiefs' names during this period. But Sir Harry Johnston based his decision on the fact that the authority was given in the treaties signed between the British Government and the Chiefs. The Collectors' powers were supreme in any civil matter within their jurisdiction,<sup>3</sup> but all serious criminal matters were to be sanctioned by the

---

1. Ibid., p. 153.

2. Ibid., p. 153.

3. Ibid., p. 153.

Commissioner and Consular-General at Zomba.<sup>1</sup>

Although the two types of judicial officers worked hand in hand, it can be seen that the Collectors were important officials of the Government, in that they were vested with administrative as well as judicial duties. As one of their functions was to levy taxes on the African populations in their areas, they interpreted the policy of the Government in dealing with the African communities.<sup>2</sup> Thus on their good offices, depended the kind of relationship that developed between the Government and the African population. It should also be noted that at this time the system of principal Headman, an agent, who was more acquainted with African customs, had not yet been introduced. The principal Headman acted as a Government officer and in the interest of the Government as his employer, although it is obvious that in most cases the duties of the principal Headman benefited the community at large. The Collector in dealing with the Chief as the intermediary of the African population and the Government, was likely to face some political problem in trying to persuade the Chief to accept the power of the Government and give up his own. This situation did

---

1. Ibid., p. 154.

2. Johnston to F.O. 29.7.91., F.O. 403/174.

not arise when the District Resident or the Commissioner dealt with the principal Headman, as the Principal Headman was a Government Agent, but who was in most cases accepted by his people as the N.A.

It should be emphasized that wherever a Collector was appointed he worked as the magistrate as well as the administrative officer of that district, and therefore no magistrate other than the Collector was necessary for that area. Before the creation of the subordinate courts in Malawi/<sup>the</sup> jurisdiction of the magistrate was extended to cover offences committed not only within his jurisdiction but also outside that jurisdiction whenever there was no magistrate established in that area, as the boundaries were not specifically defined until 1903 when subordinate courts were established.<sup>1</sup> Magistrates could not prosecute cases involving the death penalty, nor could they impose a fine exceeding £20.<sup>2</sup>

The magistrates were allowed to order whipping privately in prison, not exceeding 25 lashes. This form of punishment was obviously open to abuse, for lack of

---

1. Subordinate Courts Ordinance 1903. Ss. 2 and 3. Also see the chapter on Courts of Appeal.

2. Nyasaland Punishment Ordinance, 1908, The Nyasaland Government Gazette, Vol. 15. No. 6, p. 52.

supervision by higher authority other than the magistrate himself.

In regard to female offenders the magistrates had no power to sentence them to personal correction or to hard labour on any street, road or public place.<sup>1</sup> This system gave protection to women which they did not have under customary law, for under customary law they could only be protected by someone in loco-parentis to them but not by the court.

Magistrates were also given power of bail, but the offenders who were granted such bail were not required to secure surety as was and is the case in English courts. The system of bail was a relief to the offenders in Malawi during this period as it was non-existent under customary law. In such<sup>a</sup> case under customary<sup>law</sup> the defendant was put<sup>a</sup> in Gori stick until he was able to pay or<sup>be</sup> redeemed.

As Malawi was first occupied by British Settlers and missionaries, it follows that there would be a considerable number of cases arising between the European planters and their employees and sometimes between the African employees and the missionaries. This situation did not arise in the Northern Districts of Malawi due to

---

1. British Central Africa Gazette (30.6.1901) 31.12.1899, p. 2.

the absence of the European Settlers<sup>and</sup> due to the fact that part of the Protectorate was "less favourable to agricultural development".<sup>1</sup> Magistrates had power to try such cases by virtue of their judicial Warrants, provided such cases arose within their jurisdiction and sometimes outside their jurisdiction if there was no established magistrate's court or where the boundary was uncertain. Common among such cases, were those of assaults on African labourers by Europeans on the tea estates. Most of them were dealt with by the Magistrates Courts in various districts.

One Martin Gundlack, European employee of an estate belonging to a Mr. C. Wiese in Mlanje was convicted of assaulting an African labourer on the estate. Gundlack was bound over by a magistrate court in Mlanje to keep peace.<sup>2</sup>

Another case was that held at H.M. Consular Court at Ekwendeni in Northern Province, in which one William Robert Zvehl, an employee of North Charterland

---

1. Report of the Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland 1938, p. 101. Also see Krishnamurthy, B.S., Land and Labour in Nyasaland 1902 - 1911. London Ph.D. Thesis 1964. p.

2. British Central African Gazette, February, 1898, 82 - Vol. V, No. 2, p. 5.

Exploration Company, was found guilty of assaulting Africans working for the Company. He was also found guilty of fraudulently obtaining eggs and chickens from the villagers within the area. He pleaded not guilty, but was found guilty by the Court and sentenced to six months imprisonment with hard labour and fined £50. He was also asked to pay £9.10/- to the Africans concerned.<sup>1</sup>

One of the interesting points of this case, was that the assessors were mainly the officials of the Company where Zvehl worked. Among these assessors were also missionaries drawn from the denominations to which these villagers were members. A panel of such assessors i.e. composing members closely connected with the parties to the litigation would be likely<sup>to</sup>/show either bias or favour in the decision of the case. It was expressed by Zvehl himself that he feared his case would be wrongly decided as he was unpopular among the members of the Company. On the part of the missionaries it is obvious that they would rather see him punished as his alleged acts were against the principles of their teaching. In a similar situation in English Courts, a jury composed

---

1. British Central African Gazette, 103, Vol. VII, No. 6, 1900



of such a panel would be disqualified and another jury called in for fear that the accused may be prejudiced or favoured, as the case may be.<sup>1</sup> And accordingly Zvehl should have been informed by the Court of his right to challenge the assessors, since principles of English Courts procedures also applied to Malawi during that period.

Cases of Assault usually occurred whenever the European employer was cruel by nature. It was, therefore, not surprising that W.L. Livingstone was often involved in such cases with his employees. He was found guilty of an assault and for false imprisonment against his employee Sousa. The Court fined him £5.<sup>2</sup>

Perhaps it was his attitude towards his labourers on the Bruce Estate that contributed to his being the first victim to be murdered on the eve of the Chilembwe rising.<sup>3</sup>

One should not over-emphasize that assault cases

---

1. Criminal Justice Act, 1948, S. 35(1), see also R. Cross & A.J. Jones, An Introduction to Criminal Law, London, Butterworths, 1964, p. 361.

2. British Central African Gazette, 129 - Vol. VIII, No. 8, p. 2.

3. Shepperson & Price, Independent African, Edinburgh University, 1958, pp. 270-71.

took place only on the tea estates, but also between Europeans who had no relationship to certain Africans. One good example was brutal beatings by a European on Africans without reasonable ground. One Stambuli, an African peasant, brought a case against Melvill a European, at Zomba Consular Court on the following grounds:-

- (i) Damages done to his crops by Melvill's oxen ordered by Melvill;
- (ii) assault with a "chikoti" i.e. a lash;
- (iii) for further assault by the defendant on the road when the plaintiff was held down and thrashed with a chikoti.

The defendant pleaded guilty to two charges but denied the last charge. To the charges he pleaded guilty he said he was justified in that the plaintiff obstructed the road. The Consular Court, nevertheless, found him guilty and fined him £5, in addition he was sentenced to fourteen days imprisonment.<sup>1</sup>

It is interesting to note that justice was exercised by the magistrates courts, in that they did not hesitate to punish wrongdoers, including their fellow Europeans where such Europeans took liberty of assaulting and even sometimes shooting their employees as was

---

1. British Central African Gazette, 136, Vol. IX, 1902, p. 2.

noticed in the cases of R v William Robert Zvehl, R v W.L. Livingstone and that of Stambuli v Melvill. It can also be deduced here that there was attempted golden rule of justice in Malawi namely, the independence of Magistrates in Courts where they were not influenced by members of their community in punishing them according to justice. What should not be overlooked however, is the fact that although justice was not only seen but also done to the African community, it was nevertheless inadequate, in that, cases such as that of Stambuli, the defendant was only sentenced to fourteen days imprisonment. This was a clear case of assault - unlawful wounding and inflicting grievous bodily harm under sections 18 and 20 of the Offences Against the Person Act, 1861. Under these sections Melvill would have been liable to 5 years imprisonment (S. 18) and life imprisonment under S. 20. The 1861 Offences Against the Person, Act, applied to Malawi at this time by virtue of the Foreign Jurisdiction Act, 1890.

Also under customary law cases of this nature i.e. Assault and inflicting grievous bodily harm, would have entitled Stambuli a heavy lipo - compensation from Melvill failing which Melvill would have been made

Stambuli's slave,<sup>1</sup> until Melvill was able to pay the heavy damages.

Another interesting point in Stambuli's case was that it seems that by 1902 some Africans were becoming aware of their legal rights under the British rule, as it seems that Stambuli brought the case against Melvill without any legal advice but solely on his own initiative. This is all the more surprising when one considers that during this period there were relatively few Africans who could read for themselves, and thus many were unable to know their legal rights, published in the Nyasaland Government Gazettes. Here, the District Residents, were to blame on the ground that they were the medium of communication between the Government and the masses but had failed to transmit such information to the village Headmen and the Chiefs in their various areas in the ordinary <sup>(layman's)</sup> language.<sup>2</sup> District Residents seem to have occupied themselves in bringing to the notice of the Chiefs and Headmen the duties of their people such as were contained in the Ordinance for collective punishment,

---

1. Werner, A., op. cit., p. 267.

2. Report of the Commission Appointed to inquire into various matters and Questions Concerned with the Native Rising, 1916, pp. 7-8.

agricultural rules and the Africans' duty to pay taxes to the Government, but failed to inform them of their legal rights. The Nyasaland Government Gazette containing these legal rights was not only difficult to understand because of its being published in a foreign language, but also the difficult legal terms used in the Gazette. Such terms were not taught in elementary classes in missionary schools at which most Africans studied. In addition, Stambuli does not seem to have been associated with any European employer, as the evidence given at his trial was that he was an ordinary peasant in his village farm,<sup>1</sup> and therefore could not be expected to be above the average understanding of foreign law. Thus by 1897 it was noticed that magistrates exercised criminal jurisdiction over African offenders, and where ignorance of law on the part of the African defendants should have been a defence. In that year, in R v Foloko, the Consular Court, charged and convicted Foloko for stealing a waistcoat and tobacco pouch, the property of another African on a tobacco estate. Foloko was sentenced to two months imprisonment with hard labour. And in R. v Karumbi & Kwari, the Consular Court found

---

1. British Central African Gazette, 136, Vol. IX, No. 3, 1902, p. 2.

the accused guilty of administering poison ordeal by false pretences. They were sentenced to two and three years imprisonment with hard labour, respectively.<sup>1</sup>

Magistrates were granted power to try cases of murder and manslaughter committed by Africans. The magistrates could only exercise such power if the murderers were within their jurisdiction but could be extended outside their jurisdiction to the areas where there were no established magistrates.<sup>2</sup> The decisions of the magistrates' courts in such cases were subject to confirmation of a judge of the High Court after its establishment in 1902. Although they were given power to try cases of murder and manslaughter, they had no power to sentence such accused persons to death without the written consent of a High Court judge. It should be mentioned here that cases of a serious nature tried by magistrates and sentences imposed in such cases were to be confirmed by the Commissioner and Consular-General at Zomba during the time of Sir Harry Johnston as the High Court was only established in 1902, when the judge of the High Court took over the powers of the Commissioner

---

1. British Central African Gazette, May 12, 1897, p. 2.

2. Subordinate Courts Amending Ordinance, Nyasaland Government Gazette, 1911, p. 107.

at Zomba to confirm the execution of serious cases.

The Ordinance stated that magistrates were not to impose<sup>the</sup> death sentence on murderers unless with the consent of the High Court. This consent was seen to be given in most cases and it would be accurate to say that the magistrates' power to impose such sentences was only conditional on the obvious consent. Powers of magistrates to punish both Village Headmen and Principal Headmen were not expressly given to the magistrate until 1917 when an ordinance<sup>1</sup> was passed giving subordinate courts the power to punish village headmen and principal headmen for failing to arrest any offenders within their jurisdiction. They were also to punish them for their own acts and omissions.

The necessity of this Ordinance was brought about by the fact that the 1912 Ordinance, dealing with Native Administration, gave no provision for the punishment of the principal headmen and village headmen in cases of acts, and omissions committed by them.<sup>2</sup>

- 
1. Native Administration (Amendment) Ordinance 1917.  
365. Vol. XXIV, No. 5, Nyasaland Government Gazette, p. 8.
  2. 1917 Native Administration (Amendment) Ordinance, 365,  
Vol. XXIV, No. 5, Nyasaland Government Gazette, p. 8.

The Ordinance of 1912 only referred to "natives" of a community in general, but did not specifically mention the village Headmen or the principal Headmen. They thereby took the advantage of the failure of the Ordinance to mention them. When one principal headman attempted to levy taxes for his own use, on being warned, pleaded that he was immune to the Ordinance in that the Ordinance made no mention of him as Village Headmen.

Perhaps such a plea was in conformity with his understanding of certain rules of customary law whereby he might levy taxes from his people or receive rewards from litigants as a symbol of respect to the Chief and the Court. This long standing custom has been abolished by the Local Courts Ordinance.<sup>1</sup> Sections 26 and 27 of this Ordinance make it an offence for members of a court to accept rewards from litigants. Unlike under customary law members of the Local Courts are paid officials and rewards from litigants are unnecessary. Although this had already been made illegal by the 1933 Court Ordinance as it was a custom for the people to give these gifts they did not seem to have stopped doing so.<sup>2</sup>

---

1. Nyasaland Local Courts Ordinance, No. 8, 1962, §§. 26 and 27.

2. Interview. Duncan Kadango, Chief Clerk at Zomba District Court (Boma).



The 1917 Ordinance gave right of defence to the principal headman or village headman, when accused of failing to arrest an offender, if he had taken all reasonable steps to secure the arrest of the offender but had failed to apprehend him. It was also a defence for them that they were justifiably ignorant that an offence had been committed in their area.<sup>1</sup>

In regard to offences or omissions committed by them, the procedure was the same as that applicable to ordinary citizens, and defences to such offences were the same as those pleaded by ordinary citizens. It is interesting to note that even under customary law chiefs and headmen were made answerable to their omissions.<sup>2</sup>

The magistrates had also jurisdiction over divorce cases, occurring within their jurisdiction. But such divorce cases could only be taken by them if they were celebrated under the Christian Native Marriage Ordinance, 1902. The powers given to the magistrates

- 
1. 1917 Native Administration (Amendment) Ordinance, op. cit., p. 8.
  2. Livingstone, D. & C. The Zambezi and Its Tributaries. 1865, op. cit., p. 120.

under this Ordinance were confined to rules of English law and those under Christian principles.<sup>1</sup> Their power in this respect did not affect the principles of customary law, which were left to be complied with by the parties themselves in conformity with their customary laws. This means that the couples were made to travel from court to court in order to satisfy various rules of law under different systems.

The powers of magistrates were later granted to other officials in non-judicial departments. Thus in 1934, Directors of Agriculture or their subordinate officers were granted police powers to enter upon lands unlawfully planted with tea and up-rooting the tea at the expense of the owners of such lands.<sup>2</sup> These powers included interdict dealings with cotton seed and machinery but were dependent on the sanction by the higher judicial authority.<sup>3</sup>

As the Protectorate was developing there were many cases calling for the attention of the magistrates,

---

1. Christian Native Marriage Ordinance, 1902, but also (reported in the Nyasaland Government Gazette, 491; Vol. XXXI, No. 3, p. 25, 1924).

2. Nyasaland Government Gazette, October, 1934, p. 14, para 15(2).

3. Ibid., p. 94, para 73.

due to shortage of judicial officers, to sit as special tribunals, it was on this ground that non judicial officers were engaged to deal with judicial matters. But when the railway was extended to Malawi, accidents occurring on the railway, were under the ad hoc jurisdiction of the magistrates. Such jurisdiction was provided by S. 41 of the Railway Ordinance, 1907, where a magistrate having jurisdiction in that area, was to inquire into the causes which led to such accidents or accept<sup>the</sup>/manager's report of such accidents.

The magistrate was to go to the scene of an accident and conduct his inquiry there. His powers in such<sup>an</sup>/inquiry included the summoning of any Railway servant or any person to give evidence. He was also given the right to conduct judicial proceedings if he saw fit, taking into consideration the evidence given to him. Findings of such inquiries were submitted to the Manager of the Railway and the results of such findings, sent to the Governor at Zomba.<sup>1</sup>

Although such findings were sent to the Manager of the Railway, it appears that such a manager played very little part as he does not seem to have added or altered

---

1. The Railway Ordinance, 1907, S. 41. Nyasaland Government Gazette, October, 1907, p. 257.

any of the findings of the magistrate,<sup>and</sup>/it would indeed have been contrary to the independent judicial finding of the magistrate. The only presumption in regard to the role played by the manager of such a railway would be that of an ordinary witness to a tribunal.

Regarding the position of the Governor in the results sent to him, he does not appear to have acted as a court of appeal in such accidents. On the other hand it seems that the results were sent to him for his information on the findings, for all the cases sent to him at least up to 1912, were sent back to the magistrates intact.<sup>1</sup> Hence appeals by complainants to such cases would lie to the court of appeal in the usual manner. Surprisingly enough, such tribunals do not seem to have included medical officers whose expert opinion in cases of accidents could hardly be dispensed with.

When the British law was received in Malawi under various Orders in Council, it terminated the administrations of certain customary laws, especially where they were repugnant to justice and morality. Among such customary laws terminated were the administration of lunacy. It was felt under British rule that the keeping

---

1. The Nyasaland Government Gazette, 1912, p. 169.

of lunatics under customary law was not safe. In such cases a magistrate held an inquiry into the alleged lunacy and if such a person was found not fit to be left at large, he was sent to a place found fit by such a magistrate for the lunatic's confinement. This matter will be considered fully in its appropriate place under the title  
/Lunatics.

The Ordinances dealing with the powers of magistrates remained in force with minor amendments until 1962 when the Nyasaland Local Courts Ordinance was introduced. Since the introduction of this Ordinance the judicial powers of magistrates have been terminated and are now only to act as administrative officers a function which was before 1962 combined with their judicial functions in their respective districts.<sup>1</sup> The judicial functions are solely administered by Local Courts Staff appointed by the Minister of Justice under sections 4 and 6 of the 1962 Local Courts Ordinance.

---

1. Interview with O.E. Chirwa, Minister of Justice and Attorney-General for the Government of Malawi until September, 1964.

The District (Native) Administration Ordinance, 1912.

The office of principal headman was first introduced in 1912, when the British Authorities in Malawi saw the desirability of introducing the direct rule system of government, by which these paid officers who were in fact government paid servants would act as intermediaries for the Government in the administration of the country. The reasons given by the Government for the creation of the office of principle headman were that, by the time Malawi was declared a British Protectorate in 1891, the tribal system of Government had broken up<sup>1</sup> and was to be replaced by the principal headmen.

This statement is not strictly accurate in that there were flourishing chieftainships throughout the country at the time the British Government declared Malawi a British Protectorate. And although many of the indigenous tribes had been broken up because of the incursion of the Ngoni and the Yao, the Chiefs nevertheless remained in authority.<sup>2</sup> Thus the Ngoni were still powerful chiefs both in the North and Central Provinces of the country under Chiefs Mbelwa and Gomani, respectively. At the same time

---

1. Johnston to F.O. 10.12.1891. F.O. 403/174.

2. Duff, H.L., Nyasaland Under Foreign Office. op. cit. pp. 194-5.

there were strong monarchs in the North such as the Ngonde Chief Kyungu and Tumbuka Chief Mwafulirwa. In Kota Kota, Fort Johnston and Zomba there were powerful chiefs before the introduction of principal headmen. Perhaps it would be correct to state that after the various wars between the British administration in Malawi under Sir Harry Johnston and the indigenous Chiefs it would have been inappropriate to deal with the defeated as the agents of the new government. It, therefore, preferred to deal with its own selected and paid officials as the spokesman of the Government in interpreting its policy through the guidance of the District Residents.

The idea of principal headmanship was proposed by the Governor of Malawi in 1912 - Governor William Manning - who in writing to the Colonial Office, suggested that "... there should be formal native principal headmen selected from the people themselves and if possible chosen by the people themselves".<sup>1</sup>

His proposal was accepted by the Colonial Office with few modifications. The Colonial Office outlined the matter in the following memorandum:-

---

1. CO 525/43. (Historical Material, 19th October, 1912, Government House, Zomba).

(i) That there was to be set up white administrative officer as the local "Chief" of his area;

(ii) to give the natives considerable measure of self-government through the medium of principal headmen assisted by village headmen.<sup>1</sup>

The system was finally put into an Ordinance, under the District Administration (Native) Ordinance, 1912. For administrative reasons the scattered population, sometimes as a result of tribal wars, was gathered into concentrated villages which were brought under various principal headmen.

It seems that the new system of local government, though well organized, was foreign and alien to the lives of Malawi people and was not tribal.<sup>2</sup>

The Ordinance was based on the presumption that the political development of Malawi could only be achieved through local government, direct administration run by Africans under the mixed principles of customary law and the rules of the British system of government, unless the former were inconsistent with the latter. Under this

---

1. CO 525/44.

2. Report of the Commission Appointed to Enquire into Financial Position and Further Development of Nyasaland London. H.M. Stationary Office. Colonial No. 152. 1938, p. 33.



Ordinance it was recognized that the customary system of administration was necessary in order to achieve a good relationship between the Government and the African communities. The aim of the Government was not to change the traditional system of government itself but rather the machinery and the personnel through which it was to operate. And under this new system it was found necessary to select the personnel for its administration from the people themselves. It was not surprising therefore that the Government in appointing such personnel carefully selected people who were closely connected with the Chiefs household and sometimes hereditary chiefs themselves in order to prevent a wide-scale revolt which might have resulted in the absence of such selection of personnel. Under this system, in Ncheu District, Makwangwala who was Nduna to the Inkosi ya Makhosi, was made Native Authority taking the place of the original hereditary chief Gomani. This was necessitated by the paramount Chief Chikuse's rejection of the new system.<sup>1</sup>

In Kota Kota the Governor dismissed Kalumo a hereditary village headman and in his place appointed a

---

1. Ibid., p. 34.

principal headman - Malenga.<sup>1</sup>

In Mlanje District the administration did not encounter as much difficulty as in Ncheu. This was due to the willingness and co-operation of the leading Nyanja Chief, Mabuka, who assured the administration that he would act according to the principles set up by them. This, however, was not to be accepted without questions for it was reported by Mr. Keppel-Compton who was then the Mlanje District Commissioner, that there were many cases reported to him in which the new principal headmen who were not originally hereditary chiefs disobeyed the hereditary chiefs who were now also principal headmen. In addition, it was said that these new principal headmen refused to attend meetings called by the hereditary chiefs; it was also added that many cases were settled by these new principal headmen without the consent of the hereditary chiefs.

The District Commissioner settled the matter with all the parties concerned and reminded the new principal headmen that their position had been created artificially, whereas that of the Chiefs, although also principal headmen,

---

1. Nyasaland Government Gazette, 452 - Vol. XXVIII, No. 19.

was a hereditary one and demanded respect by custom.<sup>1</sup>

Problems which occurred in Mlanje District can only be explained by remembering that Mlanje was more affected by the constant immigration of tribes from Portuguese East Africa, Mlanje being on the border of Portuguese East Africa. When these Sena and Lomwe people arrived in Mlanje, they organized themselves into little groups which fell under some principal but not hereditary headmen. Directly below such principal headmen were a few village headmen created by the administration. It was often these village headmen who disobeyed the hereditary principal headmen in that, the village headmen tried to apply the customary laws of their people which conflicted with those of the hereditary principal headmen.<sup>2</sup>

In some cases such villages composed of the immigrants were under a principal headman who in turn was under a more powerful hereditary principal headman as was the case with Chief Mabuka. He had such lesser principal headmen under him near the boundaries of southern Mlanje.

---

1. Mlanje District Report for 1936, extract from the Speech given by Chief Mabuka (Quoted in the Report of the Commission Appointed to Enquire into Financial Position and Further Development of Nyasaland), p. 338.

2. Ibid., p. 32.

But Chief Mabuka's willingness to work under the new system eliminated the difficulties which he might have incurred.

In spite of the conflict of customary laws in Mlanje District, the immigrants from Portuguese East Africa rapidly assimilated themselves to the social order of the people among whom they lived.<sup>1</sup> Thus the Mlanje administrative difficulties were short-lived. And today it is difficult to distinguish various tribes and their origins as they have inter-married; in addition, the rise of nationalism has eased tribal differences.

Re-organization of the system of local government varied from district to district according to local conditions. Thus it has been noted that in Mlanje it was a mere change in the existing system, by making the hereditary Chief Mabuka the Chief Principal Headman, and later the N.A. This insured better functioning of the administration under the new system through the hereditary machinery. This was followed in Rumpi District where Chief Katumbi and Chief Chikulamaembe, though hereditary, are also principal headmen holding the

---

1. Hailey, Lord. Native Administration in the British African Territories, Part II. H.M.S.O. 1951. p. 24.

office of Native Authority.<sup>1</sup>

In Karonga the powerful chiefdoms of Kyungu and Mwafulirwa were only changed in name as Native Authorities but their system of government was left intact.<sup>2</sup> This principle was followed in Dedza District where both hereditary Ngoni Chief Kachere and hereditary the Chewa Chief Kaphuka were merely renamed Native Authorities.<sup>3</sup>

The establishment of native administration was achieved without difficulties among the Tonga especially in Chinteché District. This is explained by the fact that the Tonga themselves did not have a defined system of hereditary chiefs. They recognized what was known as the Council of Elders. This Council acted as a tribunal for their communities<sup>4</sup> - a system similar to that of the Kikuyu people of Kenya.

The appointment of principal headmen was made by the District Residents or Commissioners with the

1. Ibid., p. 34.

2. Ibid., p. 33.

3. Mair, L.P., Native Administration in Central Nyasaland. H.M. Stationery Office, Colonial Study Researches No. 5. p. 1.

4. Hailey, Lord, op. cit. p. 32.

approval of the Governor who had the power to dismiss them.<sup>1</sup>

It is important to note the slight difference between the Principal Headman, Native Authority and the hereditary Chief. Both Principal Headman and the hereditary Chiefs were the personnel through whom the Native Authority System was to operate. Thus it has been noted that a hereditary Chief could be made a Principal Headman whereas in other cases he was not necessarily a hereditary Chief.

---

1. Nyasaland Government Gazette. 452 - Vol. XXVIII, No. 19. 1912.

The District (Native) Administration Ordinance, 1924.

The 1912 District (Native) Administration Ordinance erected the Office of the principal Headman but did not clearly define what his powers and duties were to be. This necessitated the introduction of another Ordinance, which was contained in the 1924 District (Native) Administration Ordinance. This Ordinance was intended to draw a clear and logical distinction between the executive functions of the Government higher officials, namely, the District Residents and Revenue Collectors on the one hand, and the administrative functions of the principal Headmen in their native authority administration, on the other. Thus their powers were not to interfere with the defined functions of various departments of the Government, but were merely to assist the Government in its administration in one respect only, namely, the administration of local native affairs.

The Ordinance also meant to define clearly the duties and powers of the principal Headmen as distinct from those of the hereditary chiefs where such a principal headman was not at the same time a hereditary chief. It was therefore designed to avoid the conflict of powers and duties between these two authorities as had happened

in Mlanje District.<sup>1</sup>

Among the differences between the two authorities were that, the principal headman derived his powers from the Government and he was answerable to it, whereas those of the Chief came directly from his tribe by custom. He was sometimes answerable to the tribe in his private capacity<sup>2</sup> unless his offence affected the community at large, when he was answerable in his capacity as a representative of that community.

Although the hereditary chiefs did not derive their powers and duties from the Government, they were recognized as hereditary Chiefs through the native authority system if they were appointed to such authority. In some cases where such authorities were not assigned to them, the Government was forced to recognize them as the figure-heads of their respective tribes.<sup>3</sup> Thus when Federation was introduced in 1953, Chief Gomani who was deposed by the Government, for refusing to work under

- 
1. Report of the Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland, op. cit., p. 152.
  2. Livingston, David & Charles, The Zambezi and its Tributaries, op. cit., p. 120.
  3. Report of the Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland, op. cit., p. 152.



Federal Government was reinstalled for fear that there might be a serious rebellion of the powerful Ngoni tribe which strongly opposed the deposition of its Chief.<sup>1</sup> It was on a similar ground that the Government was induced to reshuffle the set-up of the Native Administration in Ncheu District in 1933. Thus in 1934, Makwangwala, who was one of the Ndunas of Chief Gomani and made Principal Headman under the 1912 Ordinance, was made a subordinate Principal Headman and hereditary Chief Gomani, was made the Principal Headman for the whole district.<sup>2</sup> It is submitted therefore that although it was possible for the British Government to reshuffle and reorganize the tribal system of government, it failed to unmake a hereditary chief though they refused to recognize and accept him as suitable to their system due to strength of his people.

- 
1. Interview with Rev. Michael Scott. (Rev. Michael Scott was with Chief Gomani during 1953 emergency in Ncheu and was later deported by the Nyasaland Government).
  2. Report of the Commission Appointed to Enquire into Financial Position and Further Development of Nyasaland, op. cit., p. 34.

The duties of principal headman:

It is necessary to mention that as principal headmen were official servants of the Government, they were entitled to remuneration for their services. And as it has been stated earlier, the Governor had power to appoint, to dismiss and reappoint them. They derived their powers and duties from the Governor, transmitted to them through the District Commissioner in each district. Among such duties were the following:-

- (i) To keep good order in the district;
- (ii) to report to the District Resident all crimes committed in the area;
- (iii) to arrest and send offenders to the District Resident;
- (iv) to report "in person" all affairs of the district to the District Resident;
- (v) to report all deaths and births in the area;
- (vi) to report abnormal deaths and sicknesses among the natives in the area;
- (vii) to report abnormal deaths among the livestock in the area, and their movements;
- (viii) to report the arrival in the area, of Europeans, Asians or Natives;

(ix) to submit reports to the District Residents made to him by village headmen;

(x) to regulate the burning of grass in the area, especially during dry season;

(xi) to report all cases of unauthorized squatting, or cultivating of Crown lands by natives;

(xii) to promulgate to the natives in the area such laws in the Protectorate as directed by the District Resident; and finally,

(xiv) to carry out all orders of the District Resident.

It will be seen from the duties enumerated above that the principal headman was clearly the most important officer of the Government in that he dealt with all the functions of various departments of the Government.

Under (i) to (iii) above, he performed the duties of a policeman. But as during this period a police force had already been formed it would seem unnecessary to have burdened the principal headman with these duties. The only explanation of this matter would be that there was a shortage of qualified personnel in the Police Force.

Regarding (iii) above it is not stated what facilities were given to the principal headman for arresting offenders. Neither do they state who were to assist him in effecting such arrests. In the absence of

evidence to the contrary, it would appear that the principal headman was put in physical danger especially in cases where offenders were violent and numerous as was often the case when attacking a village. The silence in the Ordinance in providing the principal headman with some means in the case of his being attacked by violent offenders seems to be in accord with the principles of the English police rules whereby a policeman is not allowed to carry weapons in order to protect himself from offenders while making an arrest. On this ground, it is a rule of law in England that killing a policeman in the due execution of his duty is a capital offence. This offence is so aggravated not merely on the ground that the policeman was in the due execution of his duty, but also from the fact that he is unarmed, and thus defenceless. In such cases the offenders were liable to death sentence,<sup>1</sup> before hanging was abolished in 1965.

In regard to the shortage of police in Malawi during this period, it should be added that the police though so styled, had not received any proper training. One merely became a policeman by being issued a uniform

---

1. *R. v Smith*, (1961), A.C., 290. See also Homicide Act (1957) S. 5(d) (unless this is changed by the Bill to abolish hanging for capital murder now before the Parliament).

and equipment for that purpose and was attached to and served under a District Officer. This system applied to Europeans only in the early days.<sup>1</sup>

It is not surprising that the administration did not put the recruitment of the police as one of the urgent items as there were few crimes in the Protectorate before the war and most of the reported criminal cases were not crimes against the person but rather against Ordinances affecting the African community.<sup>2</sup> Perhaps the absence of crimes against the person committed by Africans during the early days of the British rule could be explained when considering that, since there were multitudes of Ordinances enacted which affected their lives, the administration would choose to concentrate on the observance of these Ordinances by the African community. Hence this contributed to the overlooking of crimes against the person which might have been committed by Africans during this period. It would therefore be accurate to state that as far as the Government was concerned, the most important crimes to be

---

1. Report of the Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland, op. cit., p. 172.

2. Colonial Report, for 1911-1912, p. 16.

checked were those against the State, i.e. the breach of these Ordinances other than those against the person. And in order to safeguard these Ordinances there sprung a number of new offences.<sup>1</sup>

The breach of these Ordinances by the African community seems to have been largely due to their ignorance of the new laws which were published not only in a foreign language but also in a highly technical language which made it more difficult for them to understand. And although the Ordinance which gave the principal headman his duties stated that these laws were to be transmitted by him to his people, it was only done when the District Resident so directed. Thus much depended on how interested the District Resident was in the people in his area. In addition one wonders whether the wording of the Ordinance in (xii) above - to promulgate such laws ... affecting them as directed by the District Resident, could not also mean at the discretion of District Resident. If the presumption here be correct then it would be proper to assume that each district would be administered according to the wishes of a particular District Resident, and according to the Government rules

---

1. See chapter IV, part II under New Offences.

published in the Government Gazettes.

(v) to (vii) and (ix) above were functions originally dealt with by the village headman under customary law, where such village headman reported such events to his hereditary chief. Thus the only difference here between the principal headman and the village headman under customary law, was that the village headman reported to the hereditary chief and not to the District Officer, who was an alien "Chief". Another difference was that a village headman under customary law was not a paid officer, and in addition it was a hereditary position.

Under customary law it was a duty of a village headman or a citizen of a community to report to the hereditary chief all arrivals of aliens to their community.<sup>1</sup> The Ordinance therefore preserved this customary law duty in (viii) above. Under (x) above, customary law also regularized the burning or destroying of grass. This was necessary as fire resulting from such uncontrolled burning could affect the community and its property as many villages were usually surrounded by such grass. In addition, only the hereditary chief, who was "mwinidziko"

---

1. Livingstone, David & Charles. The Zambezi and Its Tributaries. op. cit., p. 224.

or "msienechilambo" - the "owner" or "trustee" of such land - had the power to order such burnings.

Regarding (xi) above, it can clearly be seen that this system of dealing with land was another form which contributed to the decline of the administrative powers and authority of the hereditary chief in Malawi, for being msienechilambo or mwinidziko, the land was a symbol of his authority. All those under his domain were under his power including aliens, and once accepted into such community.<sup>1</sup> Thus when the British administration took away the land from him through the system of "certificates of claim"<sup>2</sup> the Chief's power was weakened and his power could not easily be felt by his people, because the land was now in the name of the Crown in England and not under the Chief.

Since the independence of Malawi in 1964, the Office of the principal headman is of no importance. His functions have been assigned to trained Administrative

---

1. MacDonald, Duff. Africana, Vol. I, op. cit., p. 177.

2. Lord Hailey, Native Administration in the British African Territories, op. cit., p. 17.



Officers who are Civil Servants.<sup>1</sup> But the hereditary village headmens position has not been affected by the 1964 Malawi Independence.

- 
1. Such Administrative Officers are being trained at Mpemba Public Institute of Administration, Blantyre, Malawi.

(a) The Native Authority Ordinance, 1933

When the system of principal headmanship was introduced in 1912, and the headman's duties were defined by the 1924 District (Native) Administration Ordinance, it was clear that the Principal Headman combined almost all the functions of the various government departments. These functions were, however, to be under the constant supervision of the District Residents. In addition, the Principal Headman was to report all his decisions to the District Commissioner in exercising his authority as granted by the 1924 Ordinance. Thus it seems he was what one could term a mere figurehead. In that, although he was the main instrument through which the Government expressed its policy to the masses, he was without power of his own. And to this was added his liability when he was made answerable for the wrongs of the members of his community.<sup>1</sup> The Collective Punishment Ordinance manifested this fact.

Hence it would be accurate to say that the system of principal headman introduced in Malawi was a form of direct rule differing from that exercised by

---

1. Lord Hailey, Part Two, Native Administration in British African Territories, p. 27.

the British in India, where the Civil Servants were not hereditary members of the communities. In Malawi the idea was to select a hereditary chief or someone closely connected with the chief's household. But this was not always the case.

The powers and duties of the Principal Headman, as introduced in 1912 and defined in 1924, did not differ in substance from those granted by the Native Authority Ordinance, 1933. However the manner in which the Principal Headman was to administer his authority and the purpose of that authority differed materially. And although the 1912 and 1933 Ordinances used the same type of personnel i.e. the Principal Headman, the 1933 Ordinance gave the Principal Headman more power. It stated that he was to make "rules for peace and good order for the welfare of his community at large subject to the approval of the Governor".<sup>1</sup> Among the rules which the Principal Headman was empowered to make were:-

- (i) Prohibiting, restricting or regulating the manufacture... of sale,... transport and consumption of intoxicating liquors.

---

1. Native Authority Ordinance, 1933, S. 8(a) - (s), Supplement No. 1, Nyasaland Government Gazette, Vol. XL, No. 16, p. 20-21.

- (ii) Prohibiting, restricting or regulating gambling.
- (iii) Prohibiting, restricting or regulating the carrying and possessing of arms.
- (iv) Prohibiting any act or conduct which in the opinion of the Native Authority might cause a riot or a breach of the peace.
- (v) Preventing the pollution of water in any stream, water course or water hole.
- (vi) Prohibiting, restricting or regulating destruction of trees.
- (vii) Requiring measures to be taken to secure proper sanitation.
- (viii) Preventing the spread of contagious disease whether of human beings or animals, and for the care of the sick.
- (ix) Making rules for the arrest of natives whether with or without a warrant for offences committed within or without their local area.
- (x) Reporting births and deaths of natives
- (xi) Prohibiting or regulating the movements of live-stock
- (xii) Regulating food for sale to travellers.
- (xiii) Regulating the burning of grass.

- (xiv) Preventing the spread of tsetse fly, locusts, mosquitoes or other pests.
- (xv) Requiring any native to cultivate land according to agricultural rules.
- (xvi) To follow lawful instructions issued by Provincial Commissioner or District Commissioner.
- (xvii) To do any matter or thing which is allowed by native law and custom now in force and not repugnant to morality and justice.

Looking at the enumerated rules, which the Principal Headman was to issue; one wonders whether in practice these rules could actually be issued by him, or whether it was just a provision in case such a need might arise. In addition, it is noticeable that some of the intended rules were more of political nature than purely administrative. For example it seems that subsection (iii) was a provision aimed at warning those who might be in possession of arms. This was the experience the Administration had in the 1915 Chilembwe rising. In addition the Malawi citizens who had served in the King's African Rifles, and actually went to war as British subjects would influence others who had no such experience. However the Yao Chiefs had already been in possession of guns. It is to be noted that

this kind of restriction on the community's possessing arms was also a new offence in the African life. But there were hardly any people in these communities who could possess them, especially after the Chilembwe rising as prisoners had been severely punished and such punishment was a threat to other people. Subsection (iv) is an extension of subsection (iii) which also seems to have originated from the fear of the political activities as those of the 1915 rising.

While in the 1924 Ordinance the Principal Headman was burdened with highly advanced and technical functions which could not have been properly administered by him, the 1933 Ordinance went further in not only empowering the Principal Headman to issue such rules but also giving him the power to administer them. In discussing the powers of the Principal Headman as granted by the 1924 Ordinance it has been stated that the Principal Headman was the most important Government Officer by virtue of the powers he was to administer. One wonders, however, whether a principal headman under the 1933 Native Authority Ordinance would still be considered a most important officer or whether he would not now be considered a most over-burdened and a confused officer of the Government as was the case with the collectors

during 1892 - 1902 period.<sup>1</sup> To make matters worse the supervisory powers of the District Residents over the duties of the Principal Headman were curtailed by the 1933 Ordinance in that the Provincial and District Commissioners were only to be informed of any rules issued by the Principal Headman in his capacity as Native Authority.<sup>2</sup>

A few of the Principal Headmen continued to be handicapped until the establishment of the Jeanes Training Centre where chiefs were trained to run a local government under the new system. But chiefs were admitted to this school only after 1935. Unfortunately the number of Native Authorities trained there was so limited that the situation could not be dealt with adequately.<sup>3</sup>

A second presumption in regard to the greater powers granted to a principal headman, would be that the Local Government administered by Principal Headmen since 1912 was satisfactory so as to give the administ-

---

1. Johnson, H.H., British Central Africa. op. cit., p. 114.

2. Native Authority Ordinance S. 10. (2).

3. Report of the Commission Appointed to Enquire into Financial Position and Further Development of Nyasaland, op. cit. p. 18.

ration an assurance to entrust all the powers of issuing orders to the Principal Headmen.

However on the face of the 1924 Ordinance it would appear that the functions of the District and Provincial Commissioners were performed by the Principal Headman. But in fact these orders were issued by the Principal Headman only with the direction of the District Commissioner and indeed he only performed them under the supervision of the District Commissioner, or Provincial Commissioner when the matter was beyond the authority of the District Commissioner. In addition the District Commissioner had another field to be performed by him and which had not been given to the Principal Headman which was the annual 90 days "ulendo" i.e., the tour of their districts. Among the important things to be done on this ulendo were ... "Tax collection, agricultural propaganda, inspection of native courts, of roads and of food supplies".<sup>1</sup> In these trips the District Commissioner again was able, if he so desired, to inspect the activities of the Principal Headmen. Hence the Principal Headman was not left without aid of the District Commissioner or Provincial Commissioner.

---

1. Ibid. p. 158.



Another important re-organisation of the chiefs courts by the 1933 Native Courts Ordinance was the setting up of the treasuries. By early 1934 treasuries were assigned to almost all the native authorities in Malawi, although under the power of native authority the treasuries were under strict supervision of District Residents.<sup>1</sup> As treasuries were unknown under customary law, it is obvious that there would arise difficulties in dealing with them. The native authorities encountered substantial problems in keeping financial court records, having had no experience in their customary law courts procedure. Under customary law litigants paid whatever they could afford and this was in kind. The payment made by the successful litigant was mainly symbol of respect to the court. The unsuccessful litigants were liable in any case to pay lipo but part of this lipo was sometimes taken by the chief as a token from the unsuccessful litigants if they so desired, as after having paid their lipo they were not under any obligation to pay again.

As a result of this complicated system of court records there arose a considerable confusion among the

---

1. The Supplement to the Nyasaland Government Gazette, 1934, p. 4.

native authorities. Sometimes they acted beyond their power in dealing with litigants in connection with fees and fines paid to the court. In 1934 there were reported many cases in which the authorities and their clerks exceeded the powers given to them.

A messenger of a court was found guilty and imprisoned for two years for stealing court fees and tax money. In another case a native authority himself attempted to enforce a levy on crops for his personal use.<sup>1</sup> The main trouble was that the new principal headmen tried to exercise the powers of the hereditary chiefs to which they were not entitled. The difficulties experienced by the Administration in connection with the working of the Principal Headmen was noted in many Districts. In Mlanje it was only after it had been dealt with by Mr. Keppel-Compton, who was then District Commissioner of Mlanje that the matter was finally settled.

A further change in the 1933 Ordinance was the composition of the area over which the Principal Headman had jurisdiction. The 1912 Ordinance gave power to the Principal Headman covering certain areas, usually composed

---

1. Ibid. p. 4.

of seven villages. People under him in such groups or villages did not necessarily belong to the same tribe. The 1933 Native Authority Ordinance however provided that such people must belong to the same tribe, or group, and that if they were not, they must have some common origin or the Principal Headman must have had jurisdiction over them for a long enough period to be accepted by them.<sup>1</sup>

This last clause in the Ordinance avoided the confusion which would have arisen had it not been inserted. For since 1912 the Principal Headman's jurisdiction was not limited to his tribe only, but included strangers from outside Malawi. Among them were Sena and the Lomwe from Portuguese East Africa. In addition the clause avoided the unnecessary movements which would have arisen in order to re-adjust boundaries as laid out since 1912. Cases such as the trial of Chief Chiwere of Dedza where half of his community belonged to the Ngoni tribe and the other half belonged to the Chewa would have necessitated the re-adjustment of the entire administration under him.<sup>2</sup> Chiwere had his jurisdiction

---

1. Native Authority Ordinance, S. 3(3). op. cit. p. 18.

2. British Central African Gazette, 87, No. 7., p. 2. 1898.

over the two tribes since the defeat of some of the Ngoni chiefs in his district, and when the 1912 Ordinance was introduced his jurisdiction over these two groups was left intact and continued peacefully.<sup>1</sup>

The 1933 Ordinance also gave powers of Principal Headman to some of the hereditary chiefs who had previously been left by the administration. Among the notable ones were Kaphuka of Linthipe, Gomani of Nchetu, and Kachere of Dedza. These powerful chiefs seem to have been re-instated due to strong pressure by their people as stated earlier in this study.<sup>2</sup>

Looking at the workings of the 1933 Ordinance gives an impression that the workings of the Principal Headman system was satisfactory. But the constant conflict in certain districts between the principal headmen and the hereditary chiefs which generally occurred wherever the two were in the same area, shows that the system was not so satisfactory. The Headman being a Civil Servant and his office a created one, did not command much respect from his area. Such situations

---

1. Ibid. p. 2.

2. Report of the Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland op. cit. p. 34.

occurred in Mlanje, Ncheu and even in some parts of Northern Province. It was on this ground that the necessity of re-instating hereditary chiefs was felt.<sup>1</sup>

As Lord Hailey points out<sup>2</sup> the re-enstatement of hereditary chiefs to the power of Native Authorities meant that the Government created more areas for Native Authorities, but the original ones were left to continue as under 1912 Ordinance. In other cases the original Principal Headmen were merely made subordinate to the hereditary chief as was seen in the Nchen District.<sup>3</sup>

It should however not be assumed that all the Principal Headmen under the 1933 Ordinance were hereditary chiefs, for this was not the case. And again even where a Principal Headman was also a hereditary chief and though given the power to make some extraordinary rules, these powers were subject to the Governor's approval. Hence, although the 1933 Native Authority Ordinance perhaps meant to re-instate some of the hereditary chiefs, but

- 
1. Hence the removal of Principal Headman Makwangwala in Ncheu and re-enstatement of Chief Gomani - and see footnote 3 below.
  2. Lord Hailey, Native Administration in British African Territories, Part Two, op. cit., p. 27.
  3. Report of the Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland, p. 34, op. cit.

did not do so, for the Governor also had the power to appoint, dismiss or to re-appoint Principal Headmen. Under customary law a foreigner i.e., Governor, would not have such powers.

Where the Principal Headman, whether a hereditary chief or not, was dismissed or his authority ceased to be recognized, his powers were handed over to the District Commissioner,<sup>1</sup> until another one was appointed.

The 1912 Native Authority Ordinance as amended by that of 1924 did not specifically impose duties on a citizen to assist the Principal Headman in carrying out his lawful duties. The 1933 Ordinance, on the other hand, specifically imposed this duty on individual citizens under Section 5.

Section 5 of the Ordinance was reinforced by S. 13(i) of the same Ordinance which states:-

"Any person who conspires against or in any manner attempts to undermine the lawful power and authority of any Chief or native authority shall be liable to a fine not exceeding one hundred pounds or to imprisonment to a term

---

1. S<sup>1</sup> 3(7) and (8) of 1933 Native Authority Ordinance.

not exceeding one year or both fine  
and imprisonment".<sup>1</sup>

The Principal Headman whether hereditary or  
not was held liable for omissions and acts committed  
by him in neglecting or disobeying orders directed to  
him by either District or Provincial Commissioners.  
Section 7. Such offences seem to have arisen due to  
the lack of competence to issue and enforce certain  
rules as directed by the Ordinance.

---

1. Native Authority Ordinance, 1933, op. cit. S. 13(i).

(b) Native Courts Ordinance, 1933.

The Native Administration Ordinances of 1912, 1924 and 1933 established administrative areas for Principal Headmen, and gave them administrative powers. But these ordinances did not give any judicial authority to the chiefs and Principal Headmen as judicial officers. This power was contained in Native Courts Ordinance of 1929 where the native courts were to be presided over by the Principal Headman. But it was only in 1933 that the powers of the Principal Headman as a judicial officer were reinforced in Section 4 of the 1933 Native Courts Ordinance and which were not so expressly stated in the 1929 Native Authority Ordinance.<sup>1</sup>

The Native Courts were, under the 1933 Ordinance to be run in accordance with native law and custom.<sup>2</sup> The law applicable to such courts was mainly native law and custom and the courts were also to exercise jurisdiction both in civil and criminal cases.<sup>3</sup>

Under the Ordinance the native courts were

---

1. Hailey, Lord, Native Administration in British Central Africa. Part II. op. cit. p. 28.

2. Native Courts Ordinance. S. 12. 1929.

3. Ibid.



constituted by authority of the Governor through the Provincial Commissioner. Such authority was contained in a warrant, which defined the judicial powers of the Native Authorities and their limitations. By Section 3 subsections (1) and (2) of the Native Authority 1933, such powers were subject to suspension, cancellation and variation by the Governor.

By Section 5 of the Native Courts Ordinance the Provincial Commissioner had power to dismiss any member of the Court or suspend him for a period not more than three months if it was shown to the satisfaction of the Provincial Commissioner that such a member had either abused his power or proved to be unworthy or incapable of exercising his jurisdiction. Such a dismissal or suspension could only operate with the approval of the Governor.

In regard to their civil jurisdiction, all the parties to the action had to be natives and the defendant or defendants had to be residents of that area when the action arose or have been within the jurisdiction of the court at the material time. By Section 8 of the Ordinance all cases of revenue due and payable to His Majesty's Government were to be taken by Native Authorities if the offences had been

committed within their jurisdiction. In regard to criminal cases the defendant must have been within the jurisdiction of the court, or must have committed the offence or been accessory thereto in such jurisdiction at the commission of the offence. In addition all the parties to such cases must have been Africans.

Although the Ordinance stated in Section 8 that all parties to a civil action must have been natives, this was contradicted by the same Section in paragraph two which stated that all civil debts due to His Majesty were to be dealt with by these courts. It is clear here that His Majesty could not be a native, for a native was defined as any African other than Europeans or Asians.

Although the 1933 Native Courts Ordinance reorganised the customary courts system, these courts could only try lesser cases and were subject to a District Commissioner's sanction.

Native law and custom applicable to these courts was:-

- (a) native law and custom which prevailed in the area where the court was constituted. Such law could only be applied if it was not repugnant to justice, morality or inconsistent

with any provisions of any Order of the King in Council;

- (b) the provisions of all rules or orders made by Provincial or District Commissioners or Native Authority. But these provisions must have been in force in the area of the jurisdiction of the court;
- (c) any provision of any Ordinance other than the 1933 one, and
- (d) any provisions of any law which the Courts were authorised to administer by the Governor Section 12.

The Governor had power under Section 9 of the Ordinance to exclude certain natives from the jurisdiction of certain courts or certain laws, except with the consent of such natives. Section 9 does not state under what circumstances such natives could be excluded and to what extent. This Section also contradicts the Collective Punishment Ordinance whereby any member of a community or who was within the jurisdiction of that community was held liable collectively and individually for offence committed by another citizen within the

jurisdiction.<sup>1</sup>

The 1908 Collective Punishment Ordinance was still in force by the time the Native Courts Ordinance was passed. Therefore it is possible that a citizen held liable under the 1908 Ordinance could avail himself with Section 9 of the 1933 Native Courts Ordinance if he came under it, by way of defence.

There were certain cases over which Native Courts had no power, such cases were:

- (a) cases where a person was charged with an offence involving death or punishable by death or imprisonment for life;
- (b) cases in connection with marriage other than those in accordance with Mahomedan and native law.

They could however try marriage cases where both parties were of the same religion and where their only claim was for dowry. In this case however both parties had to be natives.

Thus although subsection (b) of Section 11 above, empowered native courts to try marriages celebrated under Christian rites such power was to try marriage

---

1. Nyasaland Government Gazette, 229, Vol. XVI. No. 6; 1908, p. 87.

cases only in connection with the part which was governed by customary law namely, dowry. Subsection (b) of Section 11 was also in accordance with the 1902 Marriage Ordinance which stated that the legal position of marriages between Christian natives remained effective under customary law though the marriage was celebrated under Christian rites.

Although the Native Courts Ordinance of 1933 altered or re-organized the system of courts, as regards its procedure and personnel, the Ordinance left certain formalities of the court in tact. Thus punishment was the same as under customary law except that mwavi had been abolished and imprisonment introduced. The court had therefore power to impose a fine on any offender if that punishment was allowed under customary law. But such a fine could only be allowed if it was not repugnant to natural justice and humanity.

It is not surprising that imprisonment should be introduced as a form of punishment, as under customary law imprisonment was unknown. In its place an offender was merely made a slave of the complainant,<sup>1</sup> unless ransomed by his friends or relations. In addition to

---

1. Werner, A. op. cit. p. 267.

the punishment not being repugnant to natural justice and humanity, it had in all cases to be proportionate to the nature and circumstances of the offence. This clause was an obvious relief to the defendants who had been used to severe punishment, sometimes not appropriate to their cases, such as where mwavi was ordered to be administered on innocent parties or where the innocent parties themselves offered to take mwavi in order to prove their innocence. This unsatisfactory form of punishment by mwavi remained in force until the Witchcraft Ordinance was passed in 1911.<sup>1</sup>

Contrary to customary law, offenders under the Ordinance were confined to a prison specifically provided by the Provincial Commissioner. Where the Provincial Commissioner had not authorized any place as a prison for native prisoners, any place established under any law of the Protectorate as a prison for the natives was deemed suitable for such an offender.

The power of imprisoning offenders had been granted to magistrates who could only sentence offenders to six months imprisonment. This power was confined to magistrates only until the 1933 Ordinance was introduced,

---

1. Witchcraft Ordinance, 1911 Nyasaland Government Gazette. 261. Vol. XVIII. No. 7, p. 100.

when it was also extended to native courts, but even in such cases only when such offences were against customary law in force within the area of the jurisdiction of the court. By virtue of this Ordinance courts were authorized to recover any damages in instalments, or in kind, or by sale of any property belonging to the defendant. Any fine or part of such fine recovered from the defendant was to be paid to the aggrieved persons and the defendant was not to be prosecuted again.

Although the Ordinance under Section 14 stated that such punishment was to be proportionate to the nature and circumstances of the case and not excessive for such an offence, it did not specifically limit the power of the native courts in regard to the direction of such punishment. In addition it did not state who was to determine if such a punishment was proportionate to the nature of the case, although probably the answer to this question could be deduced from the use of Section 31 of the same Ordinance where Provincial and District Commissioners had power of reviewing cases held in native courts when necessary. And here the District Commissioner and Provincial Commissioner seem to have acted on courts of appeal under Section 7 of the subordinate courts of 1903.

It was in contempt of court for any African to fail to produce any document or to refuse to answer questions when asked by the court. To refuse to sign any document in the court or intentionally insulting the court was also contempt of court punishable by £5 fine or 7 days imprisonment.

Courts could also summon anyone to give evidence when so required. The native courts were given power to arrest anyone refusing to obey the summons to give evidence. They could also order a fine of £2 from such a person or imprison him for 7 days. Section 39 of the Ordinance increased the customary powers of detaining offenders whenever found suitable. The difference here between customary law and the Ordinance was that under the former offenders were to be made slaves in case of default to compensate the aggrieved party while under the latter they were only to be imprisoned in lieu of the fine.

The Native Courts Ordinance introduced a further new element in the native courts in that in all cases parties were to appear in person. Provision was

---

1. Native Courts Ordinance, 1933. No. 14. Supplement No. 1. Nyasaland Government Gazette, Vol. XL. No. 16, p. 29, Zomba.



made for anyone in loco parentis to appear for his dependants. Section 23 of the Ordinance stated that there were to be no pleaders allowed in these cases. In disallowing parties to use pleaders it would seem that the court deprived those parties who could not plead for themselves and who had no one in loco parentis, the right to employ expert pleaders to plead for them as was the case under customary law where Aphungu could sometimes be asked by the court to assist a handicapped party to interpret his case to the court. The provision of this Ordinance therefore affected parties who by nature:-

- (i) could not speak for themselves in court or in public and thereby to present their case properly, and
- (ii) persons who by some misfortune were without any person who stood in loco parentis to them and who were strangers to the area over which the court had jurisdiction.

Being a stranger to customs of the area he could not understand the proceedings of the court as the law applicable to these native courts was "native law and custom". This meant the native law and custom of the members of the community who were in those areas

at the time the court was granted jurisdiction over such people.<sup>1</sup> This clearly excluded a stranger who only became a member of that community after the court had been established, unless by some coincidence that member's law was similar to that of his new community. The main purpose for the provision which excluded African pleaders seem on the part of the Administration to eliminate the irregularities existing under customary law when such pleaders called the Aphunga pleaded for the parties. (See the discussion under Courts/<sup>of</sup>Appeal chapter IV).

Provision was made whereby, under Section 9, the Governor had power to exclude certain people from the jurisdiction of the court within their area. Such a provision obviously was often resorted to in order to solve such cases as the one stated above. People affected by Section 9 of the Ordinance would seem to include the Lomwe and Sena who continuously migrated to Malawi even after 1933 when native courts were established under the Ordinance.

In such cases however it would be an abuse of justice if they were left to go without punishment in

---

1. Ibid. S. 4., p. 29.

appropriate cases by pleading that they were strangers to the native law and custom of that area. It would therefore seem that the aid of assessors from such tribes would be resorted to in order to administer justice for all parties concerned.

The power of the courts to exercise jurisdiction over all persons within their jurisdiction has not been repealed by the 1962 Nyasaland Local Courts Ordinance.

It is important to note that the provisions of 1933 Native Courts Ordinance remained in force until 1962 when the Local Courts Ordinance was enacted. It is also interesting to note that the changes brought about by the 1962 Local Courts Ordinance, have not altered the provision contained in the 1933 Native Court Ordinance. Thus in fact the Local Courts of Malawi today are partly governed by the 1933 Native Courts Ordinance. However the powers of the Local Courts are slightly extended except that as in the 1933 Native Courts Ordinance the Local Courts have no power to try cases "... in which a person is charged with an offence in which death is alleged to have occurred or which is punishable under any law with death or imprisonment for life". Sub-section (b) of Section 11 of the 1933 Native

Courts Ordinance has been reproduced by sub-section (b) of Section 11 of the 1962 Nyasaland Local Courts Ordinance.

The powers of native courts constituted by native chiefs or Native Authority have been abolished. In their place there are now "Presidents" of the Court, appointed by Minister of Justice.<sup>1</sup> These Presidents of the courts are paid members of the court and are not relations of the chief's household as was under customary law but ordinary members of the community. The Presidents are under the supervision of the Local Courts Commissioners who in turn are under the Chief Local Courts Commissioner. As under the 1933 Ordinance the law applicable in these courts is customary law prevailing in the area of jurisdiction.

---

1. Local Courts Ordinance, 1962 (Nyasaland) S. 4(1), p. 3.

Position of Hereditary Chief under  
Various Ordinances.

It has been noted in Part I of this work that hereditary chiefs of Malawi were the most important members of the community. This was so because they were the symbol of power and unity in their community. Thus, if a stranger came to a village his acceptance was by the Chief<sup>1</sup> and through that Chief he was "related" to other members by owing allegiance to the same Chief. The chief had power over all those under his domain. The chief's power over his people was that of life and death, and unless in any action a member had asked to take mwavi, the chief was the last Court of Appeal.

When Malawi was declared a British Protectorate in 1890 the powers of a chief over his people and his land were curtailed. The first step in this process was noticeable during the period of Consular Courts when these courts took over cases which were previously tried by chiefs, and were now to be tried by these foreign courts.<sup>2</sup> The chiefs were left to try minor

---

1. Livingstone, David & Charles, The Zambezi and its Tributaries. op. cit. p. 224.

2. Johnston, H.H. British Central Africa. Op. cit. p. 114.

cases, even these lesser cases were subject to the sanction of the Commissioner at Zomba.

In addition to being left with lesser powers they were not allowed to impose punishment on the offenders. The only power of punishment allowed to the chief was the right of flogging. This right however could only be exercised in the presence of a European Magistrate.<sup>1</sup> Therefore, it would mean that if an offender was found guilty and sentenced to flogging, but there was no magistrate available to supervise the sentence the offender would unnecessarily be detained until a magistrate was available. An interesting point here is whether such an offender would have any right to sue the authorities for false imprisonment. This presumption arises by virtue of the wording of the Punishment Ordinance which stated that an offender found guilty by a Chief's Court and ordered to pay a fine or compensation, and who was in default of such payment could be flogged not more than 24 strokes. But he could not be detained by the Chief's Court.<sup>2</sup> But this point could also be argued by the Court

---

1. Punishment Ordinance, Nyasaland Government Gazette. Vol. V. No. 6. 1908, p. 52.

2. Ibid. p. 52.

that as they had the right of trial and sentence over him, they could detain him until such sentence was carried out. However, there does not seem to have arisen a case of this nature to call for such argument, and this may be due to the litigant's ignorance of their rights.

Another form by which chiefs' powers were curtailed was through the system known as "Certificates of Claims". By this system Sir Harry Johnston regularised the transactions which took place between various companies, some individuals and some missionaries and African chiefs. Under these transactions these groups maintained that land was sold to them by the chiefs. The facts were that between 1875 and 1890 land was continually changing hands thus enabling the European community to secure such land by -

- (i) purchase from chiefs who had no right to alienate property from the tribal community;
- (ii) purchase from village headmen who under customary law were not even qualified to deal with land, this was possible only after 1912; but even in this case only under the direction of District Commissioner.

(iii) gifts from native chiefs and people who were under the impression that they were giving mere occupation and not ownership;<sup>1</sup>  
 and (iv) outright seizure from native chiefs and people.

There has been considerable controversy over the validity of this acquisition of land. According to the African view of such transactions, it must have been right of occupation and not outright sale<sup>2</sup> which was intended on the part of the Europeans. An outright sale was unheard of in Malawi during this period.<sup>3</sup> This problem being anticipated, Sir Henry Johnston, then the Commissioner and Consul-General, called all Europeans holding such land to show reason for their tenure. And where the Europeans could show good grounds for the acquisition of such land, in that they had acquired the lands lawfully, they were issued with Certificates of Claim. By so doing such Europeans acquired freehold lands which they hold up to the

---

1. F.O. 13.10.92. F.O. 84/2197.

2. F.O. 8.8.89/1942. Enclosures.

3. Macdonald, Duff. Africana. Vol. 1. op. cit. p. 177  
 See also above Part I pp.



present day, unless they in turn sold to others.

There is an interesting account given by Rowley regarding the acquisition of Magomero by members of the Universities Mission to Central Africa in 1861. Magomero, where the Mission was established, was acquired by the Missionaries for only one guinea. It seems that the understanding of the chief who "gave" this area to the Missionaries was that he was giving them the right to occupy that area, in addition to protect that particular chief from the invading Yao tribes who were constantly attacking his village. In return Rev. Rowley gave the chief one guinea as a form of token.<sup>3</sup> One wonders whether the other forms of agreements in acquiring land in Malawi were not similar to that as reported by Rowley. If our presumption is right then one wonders as to whether the validity of the acquisition of the land and its title would not be revoked today if such facts were available.

---

MacDonald, Duff. Africana. Vol. I. p. 175 & 175 also see Werner, A. The Natives of British Central Africa. p. 271.

2. Johnston, H.H. British Central Africa. op. cit. p.

3. Rowley, H. Twenty Years in British Central Africa. p. 35.

During the early days of the British Administration this confusion of the acquisition of land brought a number of interesting cases to the notice of the magistrates.<sup>1</sup> Among such cases was that of James Lindsay v Kuntaja. This was a case claiming for foreclosure of mortgage for £500 which the plaintiff alleged that the chief had received from the tenants on the plantation. The defendant agreed that he received these rents from the said land. But he denied that he was guilty of the alleged offence as he collected the rents from his "own" land. Chief Kuntaja pleaded that when the land was given to Lindsay it was on the understanding that it was to be used only by the plaintiff but not for the purpose of collecting rents.<sup>2</sup>

Another interesting case had to do with land at Blantyre, where a claim was entered for 100 acres of land alleged to have been bought from the same Chief Kuntaja in 1896 for £29. The Chief pleaded that the land was not at all sold to the plaintiffs who were the Church of Scotland. He further pleaded that when the missionaries approached him in regard to a plot for building a school he informed them that he would be

---

1. Mineral Rights case. 1904. C.O. 525/1.

2. Consular Court, Blantyre, The British Central African Gazette, 1896. p. 2.

willing to let them have the use of a certain area. And this was the area now in dispute. The Court, however, found that the transaction was a sale of the land and not a gift.<sup>1</sup>

As stated above the confusion in transactions of land in Malawi has remained so in regard to the title and validity of such lands. In some cases it seems to have been caused due to the misunderstanding of the language between the intended buyer and the intended giver or seller.<sup>2</sup> Thus we have for example noticed that Rev. Rowley in giving one guinea to the Chief at Magomero meant to buy that land although there was no mention of "sale" in their negotiations concerning the land. The Chief on the other hand meant another thing altogether, i.e. thanking the missionaries for protecting him and his people against the Yao invaders.

There is indisputable evidence that British

---

1. Consular Court, Blantyre, The British Central African Gazette, 1896. p. 2.

2. 8.3.03. F.O. 2/747.

rule in Malawi broke the power of hereditary chiefs in many instances.<sup>1</sup> Land being one of the most important back-bones of chiefs' powers, it would be obvious that land was greatly affected. Apart from the Certificates of Claim which have been discussed earlier there was the question of treaties. The effect of these treaties "was to vest the entire soil of British Central Africa in the Crown", as was decided by the judgement of Judge Nunan on July 2nd 1904.<sup>2</sup>

But this fact does not seem to have been understood by the chiefs during this period.<sup>3</sup> These treaties were mainly made between 1890 and 1893 when Sir Harry Johnston and his Vice-Consul J. Buchanan actively asked the chiefs to sign what the Consul and his Vice-Consul called treaties.<sup>4</sup> Buchanan's treaties at Kōka Kōka obviously exceed the treaty power granted

---

1. Johnston to F.O. 2.7.88. F.O. 84/1883.

2. C.O. 525/1. Mineral Rights Case 1904.

3. C.O. 525/4.

4. Johnston to F.O. 28.7.91. F.O. 89/2114; and Johnston to 7.7.92. - F.O. 84/2197.

to him.<sup>1</sup> This transaction meant the transfer of the chiefs' sovereignty to the Crown thereby reducing the chiefs' rights to these land to that of an ordinary citizen. To make things worse these agreements not only reduced the chief to a citizen of a community but also a subject of another sovereignty namely, the British Crown.

These agreements make incredible reading. One cannot help but be struck by the blatant dishonesty of some of the British officials who obtained them. It is true that on the part of the chiefs they were mainly motivated by the desire for peace from the Portuguese aggression on the Southern border of Malawi, where the Portuguese armies were continually coming into Malawi to invade the people of Malawi and declare their supremacy and sovereignty over these people. In addition the chiefs seem to have accepted British protection in

---

1. Oliver, Roland, Sir Harry Johnston and the Scramble for Africa. Chatto & Windus. 1957. p. 162.

order to put an end to the slave trade which was becoming a commercial transaction between the Arabs and the Yao chiefs. It would be correct to say that these chiefs had no idea of the implications of these treaties.<sup>1</sup> This can be seen from the fact that some of the chiefs simply made over all sovereign rights without reservation. Few others inserted certain clauses such as "reserving only proprietary rights to the soil". While others stated "our existing villages and plantations shall remain undisturbed and in our possession". In only three out of twenty-one treaties and deeds, is there any indication of the readiness of the chiefs to accept

---

1. Sharpe to Johnston. 3.6.91. Enclosure to F.O.,  
7.7.91. F.O. 84/2114.

taxation by the Colonial officials.<sup>1</sup> Taxation was regarded as a right only exercisable by the chief under customary law of Malawi, though not in the strict sense of the word for it was only a gift on the part of the citizen. Thus there seems to be ample justification for the resistance by many chiefs to the British land and taxation policies, notably Chiefs Gomani and Mponda at Ncheu and Fort Johnston, respectively.<sup>2</sup>

The land situation, which was eventually a cause of friction between Europeans and Africans, took different forms, for land was owned by different groups of people. Thus in the North the largest part of the area was owned by British South Africa Company whose  $3\frac{3}{4}$  million acres was in North Nyasa District alone.<sup>3</sup> In the Southern Province more land was claimed by European planters by virtue of Certificates of Claim. Thus the largest concentration of these lands was used for non-African agriculture. Blantyre, Limbe, Cholo Mlanje, Lujeri and Zomba were the districts most affected

---

1. The Map of Africa by Treaty. Vol. 1. Printed by the Foreign Office. ed. by Hertslet, K.C.B., pp. 285-291. H.M.S.O. 1909.

2. Interview with Chiefs Gomani and Mponda.

3. Lord Hailey, Native Administration in the British African Territories. Op. cit. p. 17.

by Europeans and by Europeans plantations holdings.<sup>1</sup>  
 During the period when European planters started making use of the land it was widely felt by the African community that, the land which they had given away, as a form of token and which these European Planters were to make use of, but not to alienate, was legally taken away from them. At this same time the Nyasaland Government was trying to impose restrictions on the European Planter in his relationship with his African tenant.<sup>3</sup>

Apart from this system of obtaining land by Certificates of Claim or purchase, there were Ordinances passed which regularised the system of land ownership and in so doing took over the power of the chief by legal means. The most important form of acquisition of land was when land was acquired for the use of the public. In 1907 an Ordinance was passed empowering District Commissioners to employ anyone to enter upon and survey

- 
1. Report on Economic Survey of Nyasaland, Zomba: Government Printing Department, 1960. p. 37.
  2. Krishnamurthy, B.S. Land and Labour. London Ph.D Thesis 1964. p. 82.
  3. Report of the Commission Appointed to inquire into the occupation of Land in Nyasaland Protectorate, 1921. CMD 10582.



any land in such a locality, or to dig or bore into the sub-soil or to do all other acts necessary to ascertain whether the land was useful for a particular purpose.<sup>1</sup>

If every District Commissioner was empowered to acquire land in this way, it would be obvious that a great deal of land would be used in each district for public purposes. In addition the Ordinance did not state whether in order to acquire such land the District Commissioner was first to approach the Chief of the area for his consent. The absence of the consent of the chief shows that he was no more of importance in such matters. This Ordinance empowered the Governor in His Majesty's name and on His Majesty's behalf he might make and execute, under the public seal, grants and dispositions giving land to private semi-government bodies within the Protectorate, which might be granted or lawfully disposed of by His Majesty. Such transactions however, had to be in conformity either with some Order in Council or some Ordinance in force in Malawi.<sup>2</sup>

A similar Ordinance was passed empowering

---

1. The Acquisition of Land for Public Purposes Ordinance, 1907, S.3 (i), Zomba.

2. Ibid.

Government Engineers to approve plans submitted by Railway Companies concerning land for their use, if the plans were appropriate. Such acquisitions of land were lawful once approved by the Government.

In addition to the use of land by the Railway Company and for public use in the districts as stated above, there was a question of Crown land which was acquired by "treaties". By these treaties chiefs were deemed to have surrendered political authority as well as the entire ownership of the land.

It would be accurate to state that once the judicial power of the chief was handed over to the Magistrates Courts following the acquisition of land by the Government and certain individuals through Certificates of Claim, the power of the chief was taken piecemeal until he was left with certain less defined administrative powers which were the trial of minor cases.<sup>1</sup> These powers were finally taken from him in 1912 when the office of Principal Headman was introduced, unless that Principal was also a hereditary chief.

Johnston's view on this subject was that in

---

1. Johnston, H.H. British Central Africa. p. 114.

order to develop Nyasaland properly the country had to be ruled by white people but developed by Indians and worked by black people.<sup>1</sup> This proposed system of Johnston, which he put into effect by importing Sikhs from India and bringing more Europeans into Malawi, meant the overthrow of hereditary chiefs. And in addition the people under deposed chiefs were given menial jobs which could not develop their intelligence politically and otherwise.

In addition to being given menial work which could not develop his intelligence the African citizen, though under another authority, namely, that of the Principal Headman, was made answerable in certain duties to his new Chief, namely, the European. Private rules were made to this effect, such as the restrictions of certain Europeans refusing Africans the privilege of wearing European clothes and in asking them to remove their hats whenever a European approached. Such events though not serious in themselves, threatened the African and made him fear the European master, thereby reducing his allegiance towards his hereditary chief as such

---

1. F.O. 2/55 Johnston to Anderson, 10th October, 1893. Also quoted in Hanna, Nyasaland and the North Eastern Rhodesia, p. 227.

fear made him feel that a European deserved more respect than the chief by the new law.

The view adopted by Johnston (stated on p. 87 above) was made clear by H. Duff who was the Chief Secretary in Malawi. He further explained saying "..... I do not pretend, ... that we took charge of Nyasaland solely or even primarily for the benefit of the natives. Our first and most natural care was to protect the interests of the British Settlers there ... the natives of the country thus taken over are to enjoy the benefit of a strong and humane government, and are to participate in all such advantages of modern civilization as, from time to time may be safely extended to them".<sup>1</sup>

The words of Duff were later put into practice through Collectors during their own period and District Commissioners when they acted as the chiefs of administrative functions of their districts,<sup>2</sup> thereby taking over the hereditary functions of the chiefs. There is substantial evidence that the British rulers in Malawi undertook to suppress the hereditary authority of chiefs

---

1. Duff, H. Nyasaland Under Foreign Government, p. 198.

2. Johnston, H.H., British Central Africa. op. cit. p. 153 (1897 edition).

over their people. This policy continued through different Ordinances affecting the authority of hereditary chiefs until the District (Native) Administration Ordinance, 1912, followed by those of 1923 and 1933 respectively, when the hereditary authority of the chiefs was legally taken away from them. Although the 1933 Ordinance tried to revive their power in selecting a hereditary chief as Native Authority it did not intend to utilize his services as a hereditary Chief but as a Government official.

The administrative policy regarding the authority of hereditary chiefs brought interesting views from other Europeans in Malawi such as missionaries who had personal contacts with these chiefs. The Rev. Donald Fraser explained that "the native cannot be expected to appreciate the justice or power of an impersonal government which is not represented in any known individual".<sup>1</sup>

Another missionary interested in the hereditary chief's authority was Dr. Robert Laws of Livingstonia who advised Governor Sharp in many cases connected with the chiefs of his area and suggested personal contact

---

1. Fraser, D. Winning a Primitive People. Seeley, p. 243.

between Government and chiefs,<sup>1</sup> a matter which Fraser had suggested to Sir Harry Johnston. However in regard to the Northern Province where Dr. Laws' Mission was centred the Government's problems were not directly concerning the hereditary chiefs there but against the Arab slaver, Mlozi who had for a long time persistently fought against Chief Kyungu and other Northern Province lesser chiefs. This conflict between the hereditary chiefs and Arabs in the North paved the way for Johnston's administration, for the Karonga chiefs accepted his administration as a protection against the Arab slaver while the other tribes such as the Tonga, the Tumbuka and Henga also accepted Johnston as a bulwark against their powerful chiefs - the Ngoni - under whose power they had been.

Johnston in writing to Donald Fraser about the Ngoni Chiefs of Msjunba stated "... the Angoni chiefs have shown themselves capable of managing the affairs of their own country without compelling the interference of the administration of the Protectorate. They have maintained a friendly attitude towards the English and have allowed them to travel and settle

---

1. Livingston, P.W., Laws of Livingstonia, Hodder & Stoughton, 1912, pp. 314-16.

unhindered in and through their country".<sup>1</sup>

The statement above would be incomplete if we did not add the reasons which resulted to such friendship and acceptance of the British rule was only brought about after the bitter defeat of the Ngoni Chiefs in 1896 by Sir Harry Johnston's troops. Thus in stating that these Ngoni Chiefs were friendly one has to remember that as a defeated community there was no choice but acceptance.

The interesting point brought about by the relationship between Johnston's administration and Mlozi in Karonga and in Kota, Kota was the immediate establishment of British administration in these areas. The need for a liberator by the Northern Province Chiefs from Mlozi and their desire for peace expedited the setting up of British administration in Karonga. In addition this was helped by the good advice of the missionaries such as Fraser and Dr. Laws. But this was not the case with Central Province, there the administration seem to have had some conflict with the chiefs and especially with Mwase of Kasungu.<sup>2</sup> It was

---

1. Fraser, D. *Winning a Primitive People*, op. cit. quoting Johnston's letter, p. 239.

2. Johnston, H.H. *British Central Africa*. p. 144.

not until the Principal Headmanship system was initiated that the chiefs of the Central Province accepted to work as Native Authorities under British rule.

As explained earlier the deep Southern Province Chiefs were in a position to accept British rule especially in Mlanje in order to avoid Portuguese aggression. Fortunately for the British administration the leading chief in Mlanje - Chief Mabuka - accepted the British rule on condition that his hereditary authority be left unimpaired.<sup>1</sup>

The influx of the Sena and the Lomwe people in multitudes from Portuguese East Africa where they ran away from dictatorial rule of the Portuguese Government had some effect on the authority of hereditary chiefs in Malawi. They did not belong to any particular chief in the areas they settled and apart from being looked after by these chiefs, they attracted the interest of the British Government in Malawi to look after them as they were under the Government's protection. The Government's access to them meant

---

1. Mlanje District Report, quoted in Report of the Commission Appointed to Enquire into Financial Position and Further Development of Nyasaland, p. 338.



interference with the internal administration of whatever chief they were under. This was emphasized by the registration of male residents of non-native origin which stated that they were to make declarations if they had not been exempted from liability to serve in Nyasaland Government military. Once such a declaration was made a non-native male including the Africans from Portuguese East Africa could be exempted from such services.<sup>1</sup>

Under customary law such male adults though from outside jurisdiction could be made to serve once accepted into such jurisdiction.

The Government jurisdiction over people from outside was manifested in Section 9 of the 1933 Native Courts Ordinance whereby certain people might be exempted from jurisdiction of native courts. It has been presumed that such people may include people from Portuguese East Africa.

Finally it can be stated that taxation which was imposed on the African people by the British was another strong instrument by which British authorities

---

1. Registration of Male residents on non-native origin, Nyasaland Government Gazette, 434. Vol. XVIII. No. 1. p. 12.

usurped the powers of the traditional chiefs. This is so because it was not possible during this period for the African member of the community to show his courtesy to his chief, for among the African people to give or pay something to the chief was a matter of courtesy and not obligatory. But although it was not obligatory, on the part of the African, to give gifts to the chief it was a moral duty to do so, (and thus) was made into a legal obligation by the British administration.

It is not surprising therefore, that although these Africans had accepted the imposition of taxation on them by the British authorities they requested Sir Harry Johnston to reduce the rate of taxation.<sup>1</sup>

Although this request was granted it is interesting to note that within three years after the imposition of taxation on the African community the administration was able to raise £1,639.0.0d and by 1896 this source alone brought into the Government Treasury £4,695.0.0.d in value.<sup>2</sup> This obviously meant that some of the taxation was paid in kind as money was

---

1. Johnston, H.H. British Central Africa. op. cit. p. 110.

2. Ibid. p. 112.

not common throughout the Protectorate during this early period. This handicap of receiving taxes in kind was indeed one of the reasons why Sharpe insisted that revenue from taxes was not for the trade routes only, as was demanded by the Planters. Hence the taxes from European planters were also to be used for the development of the Protectorate as a whole.<sup>1</sup>

Under the Local Courts Ordinance, 1962, the Chief's authority over his people has been further curtailed. His judicial functions have been transferred to trained Local Courts Presidents, who are paid Government officials.

---

1. See Krishnamurthy B.S. London Ph.D. thesis Land & Labour, 1964. pp. 147-148. and see Sharpe's letter to Foreign Office. 16.8.97. F.O. 2/129.

## CHAPTER V.I

### The Law of Persons

#### The Role of Male Adult

It has been stated in Part I of this thesis that a male adult owed allegiance to his tribe and, therefore, to his Chief. He was expected to be capable of defending his community when required to do so. Thus although it was stated that there were no organised armies, men of any tribe had to be on the ready for action at a moment's notice. The usual call by "Ngoma" brought them to the Chief's palace at once.<sup>1</sup> Refusal to obey such a call without reasonable grounds entitled the Chief to have such a male adult put to death.<sup>2</sup>

The "impi" among the Ngoni trained these male adults, to be the Chief's guards and of their community. Further, allegiance was shown amongst these impi-trained warriors by guarding their Chief's palace throughout their period of service.<sup>3</sup>

Minor duties of a male adult were to maintain his

---

1. Livingstone, David and Charles, The Zambezi and its tributaries, op. cit., pp. 96 and 292.
2. Ibid., p. 277.
3. Interview - Chief Chakhumbila.

family and all those under him. But there were differences in regard to his duty to his family, depending on whether he came from a matrilineal or a patrilineal society.<sup>1</sup>

The status of male adults was clearly distinguishable under British rule. This was not quite so under the traditional system unless there were slaves who formed an inferior class of male adults until they were released from such bondage. One should, however, qualify the above statement in saying that the class of the male adult under the traditional system was undistinguishable, for it was sometimes distinguishable when one considers that there were Chiefs, Village Headmen and ordinary male adults below them. The main distinction, therefore, is that under customary law they were so distinguished by custom and a man could generally climb to the higher social ladder if he was within the line of succession of any important family.

The status of the male adult in his community was suddenly changed with the establishment of British rule. Under the British rule he could climb that social ladder up to the top, not because he was born within that family qualified by tradition to deserve a higher social status, but rather because he was trained for it. Thus when the Civil Service was established in Malawi, those who qualified for appointment to the Senior Civil Service commanded respect in their neighbourhood whereas the traditional respect commanded by the Chief was brought down. But this was only possible in the towns. Of this view Duff

---

1. See Part I on the discussion of male adult under customary law.

wrote; "... in nine cases out of ten throughout British Central Africa today, the word "chief" means rather what the Portuguese call a "capitao" - a sort of overseer under Government surveillance; ... they (chiefs) have grown accustomed to the loss of power."<sup>1</sup>

In fact by 1901, some of the Chiefs, who had been powerful before the establishment of British rule had been brought to mere nominal chieftaincy and were not felt to be of any threat to the administration.

The demoting of these powerful chiefs was done, not only by the European planters, but also by the authorities in the administration and it was not surprising when, in 1904, it was reported by H.M. Commissioner Alfred Sharp that Chief Mwasi had been reduced to a mere nominal Chief and that it was easy to deal with him<sup>2</sup> under his new status.

The idea of demoting powerful chiefs such as Mwasi was necessary because of the wealth of their areas and it was thus

---

1. Duff, R.L., Nyasaland under Foreign Office, op. cit., p. 193.

2. F.O. 2/866.

not surprising that Mwasi should have been attacked and expected to surrender, as the Commissioner himself stated Mwasi's area was "rich in cattle and ivory".<sup>1</sup>

Under the British rule the classes of male adult fell into three main categories. The first group was that of the male adults whose status was not altered, but remained the same as under customary law. This was so because he remained in the village and did the same work as under customary law. While in his village, under his hereditary chief, his duties towards that chief remained unchanged. This, of course, could only be so if he was not affected by the 1912 District (Native) Administration Ordinance, whereby he might be cut off from his original area to another area where the Principal Headman was not his hereditary Chief. Although this male adult remained home, he may have been influenced by missionary education. Again the constant movement of tribes during this period meant meeting strangers from outside his village which influenced his obligation towards his own Chief.

---

1. Ibid., F.O. 2/866.

This depended on what type of people he mixed with, thus if he met people who were loyal to their own Chief, his attitude was not affected. But if the people he met were those from either a chiefless community or because they were without a chief, for some reason such as those who had been placed under a Principal Headman for a long time and whose Principal Headman was not their original chief. In such a case he would himself prefer to be without a hereditary chief depending on whether this more advantageous to him.

Both the missionary influence and that of the strangers helped him to be aware of things beyond his village. The fact that the missionary teachers taught male adults in their communities, helped these male adults to retain their cultural values of their communities. It also helped them to look up to their Chief as the head of their community, for the missionaries dealt with the hereditary chiefs wherever they were established as



heads of these communities. They received the right of using the plots for building their schools from these chiefs.

It is obvious, however, that as these male adults were in constant contact with these missionaries in the villages, they would be influenced by Christian philosophy. Thus if he was converted to Christianity it would be obvious that he could not practise polygamy, although he had, before his conversion, believed in such a system of marriage. However, it should be qualified that the 1902 Native Marriage Ordinance stated that "natives" marrying under Christian rites retained their customary rights and that such rights were not affected by the Native Marriage (Christian Rites) Ordinance.<sup>1</sup> His attitude towards his immediate family, however, was affected, for he still remained the father and head of his immediate family. But this depended on whether he came from a matrilineal or a patrilineal tribe.

The second group of male adults was that which left the village to work elsewhere temporarily within the Protectorate. The male adult in this group was

---

1. The Native Marriage (Christian Rites) Ordinance, 1902.

engaged in more advanced activities which his immediate tribe could not have offered him. The early activities in which he was engaged were under the early missionaries. At this point it is necessary to distinguish missionary influence over different classes of male adults. Thus the missionary working in a village, at a mission school, did not have a substantial effect on the members of that village. Therefore, he did not change the customary obligation of the male adult and other members of the community towards their law and custom. The male adult who worked for missionaries in the mission stations, on the other hand, was under complete control of his employers. Such a male adult was engaged as a teacher, a cook, a minister and sometimes as an interpreter. These male adults lived on the mission stations and made these stations their temporary homes.<sup>1</sup>

Among the early male adults to be influenced by missionary employers was John Chilembwe who, after having

---

1. Krishnamurthy, B.S., Land & Labour, Ph.D. Thesis, 1964, p.63. Quoting Dr. Laws Diary and Journal of Livingstone Mission, 1875-6.

worked for the missionary Joseph Booth, accompanied his employer to America where he was trained as a clergyman. It was this missionary influence which changed the whole outlook of Chilembwe towards his community and made him feel that the Chief's power was not strong enough to suppress the influence of foreign rule and thereby took over this power of the Chief himself.

As these male adults lived on the mission stations with their families under the protection of the missionaries, it is obvious that the missionary influence on the African community would affect their customary law. The missionaries felt it their duty to govern not only the social lives of the African community under them, but also their legal relationships.

[It is perhaps important to state that some of the activities of the missionaries in their stations.] It is

true to state that though the missionaries were the first to settle in Malawi and thereby dealt directly with the Africans before the establishment of British Rule, they were not allowed to deal with the customary laws of the African people. The decline of the tribal institutions was partly due to tribal wars, including the activities of European traders and later by British administration by passing Ordinances which abolished, modified or restricted certain customary laws. But missionaries do not seem to have played an important role in the decline of the customary laws of these people except in marriage. But even here the Christian marriage rulers only affected those members who desired to be members of Christian denominations but did not affect those who did not accept the rulers of Christian teachings. Thus, whereas the British administration made laws which had to be accepted by African members by law, it was not the case with the rules of Christianity. These forces greatly weakened the family and tribal ties of the Malawi people.

The early intervention of the missionaries on customary laws and tribal wars appear to have been motivated by sympathy for those overcome by their fellow-men.

Constant intervention was made by David Livingstone<sup>1</sup> and later by other missionaries, especially the members of the U.M.C.A.<sup>2</sup>

The U.M.C.A. was in this matter first led by Bishop Mackenzie who often intervened on behalf of defenceless groups and slaves captured by more powerful tribes. On the question of using force, Bishop Mackenzie wrote; "I ought to say a word about the principle of using force and even firing it necessary upon the captives of these poor creatures, in order to free them. The objection lay chiefly in this, that having been sent out to this country to bring blessings and peace, I could not reconcile myself to kill them even in self-defence and I still think that if by any possibility the inhabitants of this land should attack us to drive us away or to rob us, we ought not to kill them."<sup>3</sup>

Livingstone commented on the missionary intervention that "... those who know best the peculiar circumstances and the loving this good-hearted man, will blame him least."<sup>4</sup>

- 
1. Livingstone, David and Charles, The Narrative of Expedition to the Zambezi and its Tributaries, op. cit., p. 355.
  2. Rowley, H., Twenty Years in Central Africa, op. cit., p. 33.
  3. Coupland, R., With Kirk on the Zambezi, Oxford University Press, p. 197.
  4. Livingstone, David and Charles, The Narrative of Expedition to the Zambezi and its Tributaries, op. cit., p. 416.

The missionary view on this subject was widely accepted by other missionaries in Malawi. Hence it is not surprising that Dr. Robert Laws should also have supported such activities when he wrote; "... While we do not depend for our safety on Snider rifles but on Him who holds us in His hand, it will not do to let these people do as they think fit. For in that case property and life itself would not be secure. . . . It is a difficult question because the natives require to be dealt with a firmness which to those at home would seem harsh and there is always in one's breast a strife between justice and forgiveness. . . ." <sup>1</sup>

Duff, L.H., felt that to punish Africans severely was, in his opinion, indispensable among primitive people and added; "... legislative retribution (among the primitive people) is of necessity exceptionally severe." <sup>2</sup> To this view of Duff, MacDonald had stated earlier on that flogging of Africans by the missionaries was "... a milder chastisement than he (the African) would have had from his countrymen." <sup>3</sup>

The fact was that there was no police to suppress

- 
1. Quoted by P.W. Livingstone in "Laws of Livingstone" Hodder and Stoughton, 1912, p. 123.
  2. Duff, L.H., Nyasaland under the Foreign Office, op. cit., p. 345.
  3. MacDonald, Duff, Africana, Vol. II, op. cit., p. 43.

violent acts of other social groups who sometimes came from Tete Portuguese East Africa and slave-trades<sup>1</sup> made it necessary for the missionaries to intervene and punish the wrongdoers; and indeed as a form of discipline it was sometimes necessary for the missionaries to punish those with whom they worked, considering that at this time they were not under the authority of their hereditary Chiefs, having moved to the mission stations. Hence the adoption of flogging by them as a form of discipline could not be emphasized this being a form of punishment known to the missionaries.

But this system of punishment was not favourably received by the home missionaries in Great Britain and when the news of a missionary execution at Blantyre of an African -(Manga of Chief Kapeni village in Blantyre, who was alleged to have murdered an African woman at the mission station,)-reached the Home Mission in Scotland, the Home Mission sent the following message; "You must always keep in view the fact that you are labouring to found and build up a Christian Church and are not laying the foundation of a British Colony or of a small State... Carefully avoid any temptation to act as judges or rulers in the land. Let

---

1. Coupland, R., With Kirk on the Zambezi, op. cit., p. 197.

it be perfectly and extensively understood that you will take no part in native quarrels."<sup>1</sup>

Considering that the system of execution adopted by the missionaries had been in use among the Malawi societies and considering also that usually there were Hereditary Chiefs near the mission stations, it would appear that the Home Missionary restrictions on the missionaries' system of punishment in Malawi were to be commanded. But it was not until the British Administration was established in Malawi in 1890 that the system of punishment, law and order was settled to some extent, as these functions were taken over by the Magistrates and Collectors.

Within this second group which worked within the Protectorate, there was another group whose status as a member of a tribal community had been substantially affected. This was the group of male adults working and living on private estates. The male adults on these estates were directly under the new head of their new community, namely the European landlord of a particular estate. Although this new landlord had power over the people under him, he

---

1. Hannah, A.J., The Beginnings of Nyasaland and North Eastern Rhodesia (Oxford University Press, 1956, p. 41). Quoting the supplementary instructions reproduced in Mins. C. of S. For. Miss. Comm., 13th July, 1881.



had very little knowledge of their law and custom. Disputes among such male adults were settled by the head "capitao", who has been defined as any African holding the highest post on the estate,<sup>1</sup> but whose post was lower than that of the lowest European on that estate. Although he could settle these disputes, he could only do so among male adults and only in connection with their work on the estate. But he could not settle their family matters occurring between the male adult and his wife or family. This was so because he was not qualified to do so under customary law. The problem of family disputes among Africans on the tea estates was a matter of concern to these families, especially if their villages had been moved to a distant site from the tea estate.<sup>2</sup> When such villages were moved to where the tea estates were established, within their areas, the Chief of such villages moved seldom together with their people. Hence those citizens who were left on the tea estates often lost contact with such chiefs.

Various Ordinances were passed to regulate the relationship between the European planters and their

- 
1. Interview, - B. Kadango - of Chiladzulo.
  2. Report of the Commission Appointed to Enquire into Financial Position, op. cit., p. 36.

tenants. In some cases the Ordinances helped to solve certain difficulties. But not all difficulties were solved, especially those relating to the settlement of the tenants' domestic disputes. These difficulties were mainly due to the refusal of the European planters to accept the system of Principal Headmanship on their estates. The European planters felt that the extension of such a system would interfere with the management of labour on their estates.

The refusal of the European planters to accept Principal Headmen on their estates made the position worse for the African tenants, as the Principal Headman though not often hereditary Headman was able to settle disputes wherever he was established. This was so because he was conversant with the customary law of other African communities and was able to settle their disputes.

The problem facing the Africans on the tea estates was known to the Government authorities. To avoid further difficulties arising between the European planters and their African tenants, a clause was inserted in the Certificates of Claim that no native village or plantation which existed at the date of that claim should be removed

without the consent of Her Majesty's Commissioner. This clause, however, gave no better protection to the African tenants on the estates, in that once the requisite consent was given, such villages merged into the European estate and belonged to him.

Village headmen or Chiefs who belonged to those areas had no power over their members. Some of such village headmen moved to another site. In doing so they lost their power completely over their people. In addition, those who left such areas lost the protection of the clause, as the clause protected them only while in occupation.<sup>1</sup>

Under customary law occupation was not the sole entitlement for the use of land, in that even after a member of a community had left it, he was entitled to reclaim the use of that land on return.<sup>2</sup>

The system of native tenancy entitled the tenants to remain on the estates as long as they paid four shillings rent per annum.<sup>3</sup> Later, the European estate owners insisted on receiving services instead of the rent; this was, however, made illegal by the 1917 Native Lands (Private

---

1. Ibid., p. 8.

2. Interview, Chiefs Mabuka and Gomani.

3. Sharpe to F.O. 19.5.02. F.O. 2/606.

Estates) Ordinance. Once the rent was paid, the tenant was allowed to grow crops and maintain his family on the estate. Eviction under the Ordinance was possible only after six months' notice to the tenant.<sup>1</sup>

The payment of the four shillings rent per annum had some effect on the male adult towards his customary law. Under customary law he was not obliged to pay rent to the Chief for the use of land used for building houses for his wife or wives and/or for cultivation. If he made any gift to the Chief, usually during harvest period, this was not an obligatory matter towards his Chief, for he did so merely as a sign of courtesy.

Now under the British rule, it was necessary for him to pay rent for the use of land, as was done on the estates and elsewhere.<sup>2</sup> This meant in fact that one could live under the new lord without any customary ties and obligations, but by virtue of money paid to a lord to whom he owed no allegiance. This reflected his own allegiances, which by custom he owed to his hereditary Chief whom he did not now need, as he was no longer under him and thereby

---

1. Report of the Commission Appointed to Enquire into Financial Position of Nyasaland, op. cit., p. 9.

2. Sharpe to F.O. 23.9.1903, F.O. 403/336.

lost his respect for the Chief. The man whom he now had to respect was the landlord, i.e. the European planter, not only because of the use of the land, but also for his employment.

It is interesting to note that the status of women on the tea estates was not as substantially affected as that of the male adult. This was so because the women were directly under their husbands. The direct official contacts which such women would have with their Chiefs was when they were to settle disputes, either with other members of the community or with their husbands. But most disputes with their husbands were settled by their "ankhoswe" and most of these ankhoswe were male adults and these were the people whose problem we have discussed above.

It is necessary to add that the attitudes of the male adult towards his customs did not affect his obligation towards his affinity to the same extent as it did towards his chief, unless such chief was also his affinity. Thus the mere movement of the tribes during this period did not affect their usual contacts with each other where they were related.

The last group of the male adult to be affected

under the British rule was that which migrated to South Africa and Southern Rhodesia. There they worked as labourers in the mines.

The question of migration had been a matter of concern to the Government in its initial days.<sup>1</sup> As early as 1889 over one thousand Africans had applied for and received passes to go and work in Mashonaland, in Southern Rhodesia from where they found their way to South Africa.<sup>2</sup> The inducement for going there was to obtain higher wages than they could receive in their own country. The transaction affected the Northern Province more than other areas of the Protectorate. The reason being that in these areas there was no substantial white settlement, and industries, where employment could be obtained. It is, therefore, not surprising that the figure quoted above is from Northern Province alone.<sup>3</sup>

The higher wages obtainable outside Malawi and which induced the male adult to leave his country was made possible by the assistance of the Government rendered to these male adults, and which enabled them to leave the country. It is not surprising, therefore, that in 1889

---

1. Sharpe to C.O. 14.9.08, C.O. 525/24.

2. Diplomatic and Consular Reports, Zomba, Nyasaland, 1889, p. 13.

3. Ibid., p. 13.

the Government assisted these people by establishing a free ferry to enable those from the Northern District to reach the Shire Highlands without the inconvenience of using canoes as they did before the establishment of the ferry.<sup>1</sup>

The matter of the migration labour was becoming serious by 1909, when multitudes of Africans left the country. During that year 27,800 male adults were absent from the Northern Province. Out of this figure 8,600 had not been heard of since they left the country.<sup>2</sup>

This was perhaps due to lack of good supervision by ~~the~~ foreign Governments which employed these people. This necessitated the appointment of a committee appointed to enquire into the immigration labour. This committee recommended the following, "that both Governments of Southern Rhodesia and Union of South Africa should be asked to furnish estimates of Nyasaland natives who were:-

(a) temporarily, and

(b) permanently resident in their territories.<sup>3</sup>

This situation was finally settled by the decision of the

1. Ibid., p. 13.

2. Report of Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland, op. cit., p. 99.

3. Report of the Native Welfare Committee for the year 1936, Zomba, Nyasaland, p. 16.

Nyasaland government to deal directly with the Witwatersrand Native Labour Association. This Association recruited the Nyasaland labourers into South Africa.<sup>1</sup>

The effect of working in these countries was the immediate rupture of the married lives of these male adults. The effect was felt more by the wives who were left behind. They were denied the right of child-bearing, in that once they were married they did not have the right to re-marry, though their husbands had been away for a long time unless the husband himself had authorised his people to let the wife re-marry. But in most cases these husbands had married other women in South Africa. In some cases this denial of the right to re-marry resulted in their getting illegitimate children,<sup>2</sup> which entitled the husband to divorce her under customary law.

The effect of this migration was not only limited to the immediate families of these male adults, but indeed to the political power of the Chiefs. When they returned they looked down upon their Chiefs and felt that they were more educated than the Chiefs were. This attitude was often based on the ground that these adults brought more

---

1. Ibid., p. 16.

2. Report of the Committee Appointed into Financial Position of Nyasaland, 1938, op. cit., p. 97.



money<sup>1</sup> and were respected by other citizens who were, by prevailing standards, poorer. The so called poor citizens (in terms of money) sometimes included the Chief himself.<sup>2</sup>

It is necessary, however, to state that effect on male adults working in South Africa was not generally the same on all the male adults. There have been instances where such male adults divided their property among their relations, including the Chief, which meant that his attitude and respect towards his Chief was not changed.

The main differences between male adults working within the country and those in South Africa and Southern Rhodesia were that the former group worked for institutions or individuals within the country, who had some interest in the development of the African communities. This group, of course, excluded some of the employers on the tea estates whose constant conflict with their labourers tended to show that they were not interested in the welfare of their labourers. The latter group, i.e. those who worked in South Africa were in a bad position with regard to the retention of their cultural values, not only because their employers

- 
1. Report of Enquiry into the Financial Position of Nyasaland, 1938, op. cit., p. 97.
  2. Interview with Lenard Chirwa (who had been to South Africa for over ten years).

were not interested in their personal matters<sup>1</sup> but indeed had no contacts with them, being in the mines most of the time and only receiving their wages through a foreman. Hence the change in their attitude toward their customs was from other Africans of South Africa and not necessarily from their white employers. The family ties of these other Africans in South Africa were already broken, as most of them lived in locations and reserves, where there was the absence of tribal allegiance to their Chiefs.

It is obvious that the kind of life practised in these locations affected outside Africans such as Malawi male adults. It was not surprising that some of these male adults had returned changed people, and were termed by Malawi people as "matsotsi", i.e. hooligans.

### Women

In discussing women in Part I it was stated that they were dependent on their parents or husbands and sometimes on their husbands-to-be. It was also stated that women of certain societies such as the Ngoni held important positions in their society.<sup>2</sup> Among such women were found

---

1. Sharpe to C.O. 3.709 and Enclosures, C.O. 525/29.

2. Read, H., The Angoni of Nyasaland, pp. 124-125.

women chiefs who commanded respect in their communities.<sup>1</sup>

It is interesting to note that the position of women under customary law was preserved by ~~the~~ British Rule, and indeed enhanced/<sup>it,</sup> provided it was not repugnant to justice and morality. In 1897 it was reported that a woman chief in Blantyre was encouraged by the H.M. Commissioner to continue with her functions and to send her cases to the Consular Court at Blantyre.<sup>2</sup>

One aspect of the status of women to be affected by the new administration was marriage. The Ordinance stated that any person who married under this Ordinance and married again during the continuance of the marriage contracted under the Ordinance was liable to imprisonment not exceeding five years.<sup>3</sup> This provision stating the illegality of a second marriage after one contracted under the Ordinance protected those women whose communities did not accept polygamous marriage. The Ordinance, however, strengthened the position of those who believed in monogamous marriages. This provision was not, however, as rigid as

- 
1. Livingstone, David and Charles, Zambezi and its Tributaries, pp. 92 and 108.
  2. Diplomatic and Consular Reports, Zomba, 1898.
  3. Native Marriage Ordinance, 1905, Sec. 52.

it now was under Christian marriages. The Marriage Ordinance of 1902 stated that the legal status of the marriages prior to the Ordinance between the same parties was not affected. But the section contradicts the previous Ordinance under the Christian marriage, whereby the marriage under the Ordinance prevailed.<sup>1</sup>

Perhaps the obvious change which protected women from being bound to their husbands was the gradual weakening of pre-arranged marriages by their parents. During ~~the~~ British rule it was possible for them to meet their future husbands in different institutions such as schools and hospitals where they worked as nurses,<sup>and</sup> where private contacts were possible. Parents' role would only be to consent to the arrangement. However, in some tribes the parents' consent is still of vital importance.

In addition to the above it is interesting to note that the civil contract of marriage introduced by Ordinances had some impact on the bride price, in that bride price was not required in/<sup>a</sup>civil contract of marriage. This, therefore, weakened the desire for bride price in some cases and was welcomed by the poorer people.

---

1. The Christian (Rites) marriage Ordinance, 1902.

Another effect of the Ordinances on women was that concerning offences committed by them. Unlike customary law, where women offenders were exempted from punishment, in that in most cases offences committed by them were vicariously answered by the head of their family or anyone standing in loco-parentis to them. Under the Ordinances no one was answerable for offences committed by them.

The interesting point in regard to their punishment was that although they were liable to punishment as men, magistrates were not allowed to sentence them to personal correction or to hard labour on any street, road or public place.<sup>1</sup>

Under customary law, women were not usually detained until ransomed, as was done in the case of men, neither did they pay fines for their offences. This was done on their behalf by someone who stood in loco-parentis to them.<sup>2</sup>

In 1905 the Prison Ordinance was passed making it lawful for magistrates to confine prisoners to any place which <sup>was</sup> in their opinion/found fit for such confinements. This Ordinance only legalized the existing practice, whereby

- 
1. British Central African Gazette, 3122, 1899, p. 2. (Also reported in the same Gazette on 6th June, 1901).
  2. Duff, H.L., Nyasaland Under Foreign Office, 1903, op. cit.,

magistrates confined prisoners to areas found suitable for such confinement. The Prison Ordinance stated that women prisoners were not to be confined outside their areas, districts or the area in which the offence was committed, unless with the written consent of the Commissioner or a High Court Judge.<sup>1</sup>

The need for confining women prisoners to their areas was due to the fact that they would be near their people. . . . This shows that the administration preserved the customary system whereby women depended wholly on someone above them. Husbands and parents were allowed to visit these women prisoners more often than was the case with male prisoners.<sup>2</sup>

The 1905 Prison Ordinance exempted women from flogging, as flogging was a hard form of punishment. But it is not surprising that they should be exempted, as the new administration showed some leniency to women prisoners. Surprisingly enough, young offenders, if male, were not exempted from flogging; one would think that juvenile offenders, in view of their tender age, should have<sup>had</sup> the same treatment as women, but this was not the case under

---

1. British Central African Gazette, 181, Vol. XII, No. 12, Prison Ordinance, 1905, p. 467.

2. Ibid., p. 267.

this Ordinance. The system of punishment of women offenders under the British rule relieved anyone in loco-parentis to them, for they were no more answerable for their offences.

### Infants

In Part I it was stated that children were and are the pride of their tribes. Normally beating children was not practised in order to discipline them. Training them to be of good character was a gradual process. In some tribes they were required to go to a "training centre" usually termed as Initiation Ceremony Centres. These ceremonies combined both social and political training. Accordingly, instructions were given to them by which they acquired qualities of self-defence, reliance and friendship towards each other and other members of the community.

However, delinquent children were severely punished. Parents of such children were vicariously liable to the victim.<sup>1</sup> This, of course, depended on the age of the child and the nature of the offence committed. Parents paid 'tips' whenever ordered by the Court, but they were not

---

1. Heckel, Bonno, op. cit., p. 16.

imprisoned on behalf of their children, as imprisonment was unknown during this period.

In 1905 when the Prison Ordinance was introduced, infants were treated as any other offender with two exceptions:

(a) that they were not to be imprisoned outside their districts or where the offence was committed, except with the written consent of the High Court<sup>1</sup> as was the case with women;

(b) that they were not to be confined in the same buildings with adult prisoners.

The reason for the first provision was that if infants were imprisoned too far away from their parents or members of their family, it would create inconveniences for the parents to pay constant visits to their infants, considering that transport was not good during this period.

The second provision was to avoid juvenile offenders making contact with male adult prisoners who would influence the young offenders if the adult prisoners were habitual criminals.

While in prison, juveniles were trained in some

---

1. British Central African Gazette, 181, Vol. XII, No. 12, 1905, op. cit., p. 467.



form of trade or industrial labour, but this had to be a form of trade, where hard labour was not required.

It would seem, therefore, that under the British rule the delinquent was better treated under the new prison system, for he was not only punished for his offence, but indeed was helped to reform himself into a better citizen by being trained in new techniques of trade which he would not have learned under the old system in similar circumstances. There had been reported cases among the Yao people that a persistent juvenile offender could lose his hands, as they were burnt in hot ashes so that the young offender could not use them again to commit offences.<sup>1</sup> In some serious cases it is believed that such offenders were sold into slavery.<sup>2</sup> The presumption was that such an offender would serve as a deterrent to other members in his community.

In regard to trials of offenders, in 1905 Prison Ordinance, as amended by the Prison Ordinance 1922, does not give any provision whereby juveniles could be protected during such a trial as was in existence under British law,<sup>3</sup>

---

1. Heckel, Bonno, op. cit., p. 16. See under infants above.

2. Makumbi, A.J., Mbili ya Achewa, p. 26.

3. Children and Young Persons Act, 1933, Sec. 47, as amended by s. 17 of 1963 Act.

which was applicable to Malawi.<sup>1</sup>

The juvenile offender in Malawi today is treated in the same manner as a young offender in an English court. In addition there are certain centres established in the country for reforming juvenile delinquents, including remand homes for them. While in these remand homes, juveniles are taught to read and write and not only trained in industrial labour as was the case under the 1905 Prison Ordinance.<sup>2</sup> It is hoped that under the new Government of Malawi the provisions of the 1922 Prison Ordinance will be extended and developed to cope with the growing complex society of Malawi.

When juvenile offenders were charged, convicted and sentenced, they were liable to flogging, but not exceeding twelve strokes as against twenty-four strokes administered on male adult prisoners.<sup>3</sup>

The provision of the Ordinance stated that male adults were liable to flogging not exceeding twenty-four lashes and that they were further liable to not more than ten lashes of flogging if they were found guilty of committing offences against prison regulations. The provision, however,

- 
1. Foreign Jurisdiction Act, 1890, as amended by 1907 Nyasaland Order in Council.
  2. Prison Ordinance, Nyasaland Government Gazette, 468, Vol. XXIX, No. 12. Nyasaland Legislative Council proceedings, No. 220, 1922.
  3. British Central African Gazette, 108, Vol. XII, No. 12, 1905, p. 456.

is silent<sup>a</sup> with regard to juvenile offenders in/similar situation.

### Aliens

Under customary law aliens or strangers were assimilated into the community as soon as they were accepted by the Chief of that community. They were at once granted the duties and rights of the community concerned. Gamitto, David Livingstone, Rev. H. Rowley and other missionary writers, state that Malawi communities showed great hospitality and gave protection to strangers and their property while in transit.<sup>1</sup>

Under the Nyasaland Government, the Ordinances, in particular the Native Administration Ordinance 1923, it was made an offence for a principal headman to fail to report the arrival of any strangers in his area, whether Europeans, Asians or Africans.<sup>2</sup> It was also necessary for any alien under this Ordinance to give reasons for entering Malawi, whether he was a visitor or a businessman; and if a businessman he had to state the duration of his business.

- 
1. Rowley, H., Twenty Years in Central Africa, p. 35; Livingstone, David and Charles, Zambezi and its Tributaries, pp. 224-25. Gamitto, A.C.P., Vol. I, p. 99.
  2. District (Native) Administration Ordinance, 1923. Nyasaland Legislative Council Proceedings No. 220 of 1922 - Supplement, 1924.

Under customary law, reasons for one's entrance into a community were not necessary, but one had to state how long he had to remain there.<sup>1</sup> However, as was under customary law, strangers admitted under the Ordinance were liable for all acts and omissions committed by them, but were also accorded all rights as any other citizens.

The arrival of strangers in various villages and communities during the British rule steadily increased the duties of the Principal Headman in observing their movements within these communities. This duty on the part of the Principal Headman, was mainly caused by the passing of various Ordinances. Among such Ordinances was the Townships Ordinance of 1913, which stated that "native dwellings in close proximity to any Europeans was prohibited".<sup>2</sup> If an African in such dwellings was reported to the Town Council because he became a nuisance, he was removed to a distance approved by the Council immediately. Sometimes the entire village was affected and thereby removed. In either case the Principal Headman responsible for these areas was also collectively liable.<sup>3</sup>

- 
1. Livingstone, David and Charles, Zambezi and its Tributaries, op. cit., p. 224-25, and see under Aliens Part I, Chapter I.
  2. Bye-laws, Township Ordinance, 1913, Nyasaland Government Gazette, No. 49.
  3. Ibid., p. 35.

If such villages were under a hereditary Chief, it is obvious that the Chief lost his hereditary rights and power over those people affected. This, therefore, added to the decline of his power.

### Lunatics

It has been stated in Part I that under customary law, lunacy was a well-known ailment. This is based on the fact that they were called by some special names, depending on what tribe the lunatic came from. The word "warmisala" was used for lunatics by almost all tribes in Malawi. There was and is a clear distinction between an idiot and a lunatic. An idiot is known as "wopanda nzeru" or "chitsiru" as distinct from "warmisala", i.e. lunatic.

In both these cases they were exempted from liability for wrongs committed by them. Thus their wrongs were vicariously answered by those under whose care they were. Both Rangeley and A.J. Makumbi state that uncontrollable lunatics were put to death.<sup>1</sup> However, it should be stated that putting a lunatic to death was unnecessary and not often practised if the lunatic could

---

1. Nyasaland Journal, Vol. I, No. 3, 1948, p. 16, A.J. Makumbi, Maliro nd Miyambo ya Achewa, p. 45.

safely remain in his gori stick. Hence most of these lunatics were put in heavy gori sticks which made it impossible for them to walk as the stick with a hole was put around their neck and sometimes around their legs. This form of keeping the lunatics minimized the danger of their attacking other members of the community.

When Malawi was declared a British Protectorate, the British officials felt that it was necessary to have a safe system of keeping lunatics. Various Ordinances were passed in connection with the administration of lunatics. Among them the important one was that of 1912. This Ordinance gave power to the Governor to declare by notice that certain houses were to be made asylums for lunatics. The Governor could also order that houses for the care of African lunatics be built in certain gardens or fields.

The Ordinance empowered District Magistrates to receive information from any person who had reason to suspect that a certain African within the district was a lunatic. The Magistrate was thereafter to call for an enquiry or to examine such a suspect.<sup>1</sup>

---

1. An Ordinance to Provide for the Detention and Care of Lunatics, Nyasaland Government Gazette, 13th May, 1912, p. 346.

For the purpose of such examination, magistrates were given the same power of summoning witnesses and administering oaths as was given to them in criminal trials. Agreements were entered between the District Magistrates and any citizens of the community in which the lunatic lived, such citizens could agree to take proper care in feeding, clothing and accommodating the lunatic.

The phrase used in the Ordinance was that anyone who had cause to "suspect" that a certain African within his district was a lunatic. On the face of it, this phrase would seem that the term "suspect" was not used in its strict sense, for otherwise it would be open to abuse by any member of the community. The term could also be used by those who were only interested in defaming the character of their enemies by using the Ordinance as an engine of fraud, whereas the Ordinance was designed for the protection of the community from lunatics at large.

Cases were heard when certain members of the community falsely reported their fellow citizens of being lunatics under the Ordinance. Although the District Magistrates did not find them to be insane as was alleged against them, such allegations had seriously affected their

reputations in their villages. One incident in particular took place in Mlanje, where an unpopular village headman had been reported to the Mlanje Chief Mabuka of being insane, although facts were found to the contrary. He was ~~being~~ feared by his people and beer-drinking parties were closed when he appeared. This matter was only settled when Chief Mabuka intervened.<sup>1</sup>

Lunatics were allowed to go home on leave, but were to return after the expiration of a specified period. They could, however, be allowed to stay home indefinitely if a medical officer certified that such lunatics were not a menace to the community.

Once such lunatics were returned to their homes they were under strict observance of the members of their families. Aiding or abetting such lunatics was an offence.

Families or villages were asked to contribute such sums as the court saw fit. Neglect to provide for such lunatics with suitable lodgings and clothing or refusal to allow such lunatics to be visited by a medical officer or District Magistrate or Superintendent of an asylum to which that lunatic was confined was an offence punishable

---

1. Interview with Chief Mabuka of Mlanje.



by a fine of £25 or three months' imprisonment.<sup>1</sup> As was the case under the Collective Punishment Ordinance, the community was, under the Ordinance for Detention of Lunatics, made liable to contribute to the maintenance and support of such a lunatic, in that members of a village or family were asked to contribute such sums as the Court saw fit. The Ordinance does not, however, distinguish the liability of the village from that of the family towards such a lunatic. Neither does it state whether a person who was not related to the lunatic was entitled to remuneration after giving such care. Under customary law only relations of such a lunatic were under a duty to provide for such care and maintenance. The test, therefore, under customary law was not whether that the lunatic resided in a community or a village in order for members to take care of the lunatic, but whether they were related to him in order for them to be liable for his care and maintenance.

Where a lunatic had no relation in a village under the customary provision stated above it would seem that no one would take care of him, as in this case he would

---

1. An Ordinance to Provide for the Detention and Care of Lunatics, op. cit., 1912, p. 346.

have no relation in that village. However, this was not the case, for once an outsider has been accepted in a community he is entitled to the rights in the community. It was and is still the custom that a chief would ask the members of the community to help as a form of charity.<sup>1</sup>

The main differences between customary law and the provisions of the Ordinance with reference to the maintenance of a lunatic were that the Ordinance imposed a legal duty on the community to maintain such a lunatic, whereas under customary law it was a form of charity to the lunatic and members of the community were not under a duty to take care of him unless they were related to him, as stated above.

The problem of handling cases of chronic lunacy today is obviously less acute than it was before, advent especially with the increase in the number of hospitals which brought about better means and the advances made by medical science.

As under customary law, lunatics were, under the Ordinance, prohibited to marry as they were not capable of taking care of themselves and their families.

---

1. Interview with L. Makhumbala.

Officials ill-treating lunatics in their asylums were under the Ordinance liable to a fine not exceeding £1.<sup>1</sup>

Under customary law ill-treatment of lunatics, though not a crime, was held to be morally wrong. But if physical injury was caused to a lunatic, his people could take up against the wrongdoer.

#### Works Done by Lunatics whilst in Asylum

African lunatics were encouraged to work in the asylum if fit to do so. Among the things they did were cleaning, washing, painting the asylum premises and gardening.

The Ordinance stated that European lunatics or non-native lunatics were not to do this kind of work without the approval of the Medical Officer in Charge. It is surprising that this should have been so, in that lunatics could, without medical approval, be dangerous to themselves as well as to others, if allowed to handle dangerous implements such as hoes without examining the seriousness and degree of their lunacy,<sup>2</sup> (as was the case by the African lunatics

- 
1. An Ordinance to Provide for Detention and Care of Lunatics, 1912, op. cit., p. 346.
  2. Supplement No. 2 to N.G.G. Vol. XXXVII, No. 9, Government Notice No. 32 - The Asylum Ordinance 1928, p. 41

under the Ordinance.)

Male and female lunatics were separated. In addition male attendants were not allowed to enter the quarters of female lunatics, unless ordered by the Superintendent of the Asylum or his deputy.

Lunatics were allowed to be visited by friends or relations, but visits were only allowed for a duration of 30 minutes. There were, however, other visitors who were given longer time than 30 minutes, such as religious ministers.

Lunatics were also encouraged to read books if they could. Here it is noted that, in customary law, the lunatic was confined alone with gori sticks around his neck and sometimes around his legs. He was confined in this manner even when he was feeling normal, because of the community's fear that he may be dangerous to himself and others. Whereas in asylums under British rule their minds were occupied with things such as reading of books supplied by the authorities, painting and other occupations. It was also noted that medical treatment was given to them.<sup>1</sup>

---

1. Ibid., pp. 42 and 44.

Property of the Lunatics

The property of lunatics in the asylums was under the care of the Superintendent of the asylum to which the lunatic was confined. It was not to be disposed of until after the death of the lunatic. The Ordinance does not state whether after the death of such a lunatic, his property was returned to his people. It would seem, however, that it would be administered under the probate rules which had, by this time, been extended to cover the administration of the African deceased estates - In goods of Juma Seyd, deceased, where the Registrar of H.M. Consul in Blantyre administered the goods of Juma Seyd (Saidi), an African.<sup>1</sup> If the Probate rules did not cover the administration of the deceased lunatic's property, then it would seem that the goods may have been returned to his next-of-kin as was the case under customary law.

---

1. British Central African Gazette, Zomba, January 15th, 1898, p. 5.

## CHAPTER VII

### COURTS OF APPEAL

Under customary law the last court of appeal was the Mwavi ordeal which was preceded by the Chief's Court of Appeal. The Mwavi ordeal was abolished by the 1911 Witchcraft Ordinance but due to secret Mwavi trials taking place in villages another Ordinance was passed by the 1929 Ordinance. The Chief's power as a court of appeal had been lessened by the introduction of the Consular Courts.

When British Rule was established in 1891 the Consular Courts and Collectors took the place of Chiefs' Courts and tried cases of Europeans and Asians or where a European and an African were involved. In Blantyre the Consular Courts encouraged the Chiefs to try lesser cases, and they were given the power of whipping not exceeding 12 strokes. In such matters, however, they could only try cases against customary law.

The powers of Consular Courts and Collectors were extinguished when the Magistrates Courts, as District Courts and Sub-District Courts were established

in 1903.<sup>1</sup>

The powers of the Consular and Collectors Courts were replaced by the British Central African Court of Appeal established in 1903 and sub-divided among such powers  $\frac{1}{6}$  District and Sub-District Courts and District-Native Courts and Sub-District Native Courts. This power was contained in Article 18(i) of 1902 Order in Council which established the following courts:

The District Courts. These were courts of record. They had jurisdiction over all Europeans and Asians in civil and criminal cases. By s.2 of 1903 Subordinate Courts Ordinance cases on appeal went from the Sub-District Courts to the District Courts and from there to the High Court under (s.7).

By s.7 of the Ordinance, appeals went from the Sub-District Courts to the District Courts in their original jurisdiction or on appeal.

The Subordinate District Courts were established by s.3 of 1903 Subordinate Court Ordinance. Unlike the District Court this was not a court of record, but it had jurisdiction over Asians and Europeans in civil and criminal matters within their sub-districts.

---

1. The Subordinate Courts Ordinance 1903, s. 2 & 3.

Both District and Subordinate District Courts were presided over by the District Commissioner, called District Magistrate, and the Assistant District Commissioner respectively.

The District Native Court was established by sect. 9 of the 1903 Subordinate Courts Ordinance. This Court had jurisdiction over all Africans in the district. As in the case of the District Courts this was a court of record. It tried civil and criminal cases over all Africans within the district. These courts were given appellate jurisdiction to try cases from Sub-District Native Courts on appeal. But they could also try such cases in their original jurisdiction. Parties who brought cases to District Native Courts had a further right of appeal to the High Court.

The Sub-District Native Courts were established by s. 10 of the 1903 Subordinate Courts Ordinance. It was not a court of record but had jurisdiction over all Africans within the sub-district in civil and criminal matters.

The District Magistrates presided over the District Native Courts while the Assistant District Officer presided over the Sub-District Native Courts respectively.



The divisions of the courts into District Native and Sub-District Native Courts were important divisions considering that during this time communications were not so advanced.<sup>1</sup> Without them, litigants would have spent more time to get to their appropriate courts. Thus it was possible to settle all cases in the Sub-District Native Courts under s.7 of the Ordinance without recourse to the District Native Courts unless on appeal as provided by s.7 of the 1903 Subordinate Courts Ordinance.

Changes brought about in 1929. In this year there was a radical change in the system of courts in Malawi. The four subordinate courts, namely, the District Courts, the District Native Courts, the Sub-District Native Courts and the Subordinate District Courts were all abolished. In their place three subordinate courts were created:

- i) The Magistrates Courts, usually called the First Class Subordinate Courts;
- ii) The District Commissioners Courts, usually called Second Class Subordinate Courts; and

---

1. Murray, S.S. Handbook of Nyasaland, Zomba, Nyasaland, p. See also B.S. Krishnamurthy Land & Labour, London, 1964. Ph.D. thesis, p. 146.

iii) The Assistant District Commissioners Courts, called the Third Class Subordinate Courts.

The second change took place in the same year when the Governor was given power to appoint native courts to such areas as he thought fit.

The third change was the possibility of transferring cases from District Courts to Native District Courts and vice versa, and from Sub-District Courts to Sub-District Native Courts. This was necessary because before this provision was made litigants were made to travel great distances to appear in courts which by the 1903 Ordinance they had no right to appear in, if they were not the right courts appropriate for them as Africans could not go to Europeans or Asian courts and vice versa. But by the 1929 Ordinance this was not necessary and the litigant could appear in the corresponding court.

In 1950, a new court was added known as the Fourth Class Subordinate Court.

When the 1933 Courts Ordinance was established it gave power to all Native Authorities to try native cases. The law applicable was Native Law and Custom if not repugnant to morality and justice. If there was no Native Court established in a district to which appeals

could be brought the Provisional Commissioner heard appeals from Sub-District Native and Sub-District Courts.

The High Court Ordinance 1929 was replaced by the 1958 Courts Ordinance.

The Native Courts Ordinance was repealed by s. 40.

The Subordinate Courts were reduced from four to three in 1963.

The present magistrates' jurisdiction over civil cases was not to exceed £200.

The 1962 Local Courts Ordinance has power to try cases of non-Africans and in this instance it is called Non-Racial Court. In all cases, the law applicable in these cases was the law applicable to a particular case.<sup>1</sup>

#### The Working of the Native Courts of Appeal.

The Native Court meant any Chief, Headman or Counsellor to whom jurisdiction was granted under s. 12 of the 1929 Ordinance.

The courts were held in any place which the Governor authorised. But in most cases they sat in per-

---

1. See in the Preface under law applicable to Malawi courts.

manent places where these courts were established. The High Court had access to the subordinate courts for advice under s. 10, concerning evidence, procedure and practice, in dealing with African cases.

Under the Native Courts Ordinance of 1933 subordinate courts could summon anyone to give evidence when so required.<sup>1</sup> In such cases parties were to appear in person except that provisions were made for people 'in loco parentis' to speak for those under them (see pp. 79-80).

Appeals from the Native Courts under the Ordinance.

From District Native Courts defendants could appeal to the D.C. Courts or P.C. when there was no D.C. Court for further hearing (section 29).<sup>2</sup> The proceedings could be transferred from the Sub-District Native Courts to the District Native Courts; this was so both in civil and in criminal cases. After such transfer the District Native Courts were to try the cases as if such complaints had originally been made to them.

Once the cases had been sent to the D.C. Native

---

1. The Native Courts Ordinance No. 14, 1933.

2. Ibid.

Court or P.C. of the area, whether civil or criminal, the P.C. or the D.C. could make such order as he thought fit but could not increase a sentence of fine or imprisonment without first giving the accused an opportunity to be heard by the court. If the P.C. or D.C. increased the fine or prison sentence the accused or defendant could appeal to D.C., P.C. or the High Court. But the D.C. was not allowed to rehear the case in which he had himself first sat. Cases for rehearing or retrial could be sent back to the same native courts or another native court of competent jurisdiction.

The P.C. With the approval of the Governor had the power to appoint a single chief or a body of chiefs to sit as a court of appeal with or without assessors. If such a court of appeal was not available the cases lay from the native courts to the D.C. or P.C. where there was no District Court of Appeal. Thus any aggrieved persons could within 30 days of any decision of the lower court appeal to any higher court, i.e. Native Court of Appeal, D.C., P.C. or the High Court as the case may be. The High Court had power also to order subordinate courts to make executions of any orders made by the High Court in any case.

In regard to the rights of appeal from native

courts to higher courts namely to Native Court of Appeal, to District Commissioner, Provincial Commissioner, and finally to the High Court, it would seem that unnecessary burdens were placed upon the parties to actions. It would appear that a case which had already been decided by a court composed of chiefs, in most cases with assessors, applying native law and custom, would have been exhausted before it reached the Native Court of Appeal. Above all the case could sometimes be retried by the same members as before.<sup>1</sup> Again pleaders were not allowed in the native courts and the parties had to be present in person unless someone in loco parentis appeared for them. This would therefore mean that the same parties who were engaged in the same case in the lower court were again appearing in the upper court facing the same members of the court applying the same law as was applied in the lower court, i.e. native custom and law unless such law was repugnant. It would appear therefore that what was happening in these courts was that the case was being retried or reheard by the same members of the lower court. The main difference was that the members of the court were sitting in a different court, i.e. the

---

1. Ibid., s. 32 (1).

Native Court of Appeal.

It is important to state that the advanced techniques of pleading in the court were not familiar to every member of the community in Malawi in those days. The 1933 s. 23 Native Courts Ordinance stated that "no pleader may appear for any party before a native court but the court may however permit the husband, or wife, or guardian, or any servant or the master . . . to appear and to act for such plaintiff or defendant". Thus although there were certain people qualified as pleaders, and who could have used such techniques required in a native court of appeal as that established under the Ordinance, they were unable to help the parties in these courts by virtue of the Ordinance, unless they were in loco parentis as stated above.

Another defect is the fact that both Provincial Commissioner and District Commissioner had access to native courts of first instance as well as to native courts of appeal. They also, in sitting as a court of appeal, sat with native assessors. Therefore the powers of the two authorities, i.e. the District Commissioner and the Provincial Commissioner, were not clearly distinguished. It is here that it is felt that the parties were unnecessarily burdened by going to various

courts of appeal when it could have been possible, and indeed not have lessened the costs of the parties, to go direct from the Native Courts to either the District Commissioner or the Provincial Commissioner alone, but not to both and then to the High Court unless there was no P.C. Court established. In addition this would have obviously expedited the disposal of the case.

Although there was a right of appeal in the Ordinance to various higher courts, it is necessary to mention that this right was at the discretion of the Governor, who could refuse appeal in certain cases which in his opinion were "frivolous or trivial" and not entitled to appeal; hence this right of appeal on the part of the litigants was a limited right.

The Supreme Court of Appeal for Nyasaland at Cape Colony.

Before the establishment of the High Court of Nyasaland in 1902 the highest court of appeal before the Privy Council was the Supreme Court of Appeal at Cape Colony in South Africa. This was established by the Cape of Good Hope Act of 1890. This court had appellate jurisdiction for appeals from any court acting under "the Africa Order in Council 1889". (Appeals to this Supreme Court are authorised in the manner provided by the above



Order.)

This court had jurisdiction and power to entertain, hear, and determine all appeals in matters before it and all cases stated for its opinion: s.1. of the 1890 Order in Council.

The procedure of the court was to be adapted by the judges who had power to vary such procedures from time to time under s.4. This variation, however, was not to be repugnant to or inconsistent with any article, provision or rule contained in the Africa Order in Council.

The power given to the Judge of the Supreme Court at Cape of Good Hope to vary the procedure from time to time was necessary in order to adapt to the various cases coming from various colonies.

#### The Law Applicable.

Any matter to be determined in the Supreme Court of Appeal in the Cape of Good Hope was to be in accordance with the law of the Court from which such matter was brought. Either on appeal or upon case stated in writing from the Supreme Court, under s.5.<sup>1</sup>

The system of appeal to the Court of Appeal at

---

1. The Government Gazette, Cape of Good Hope, Cape Town, 1890, July-December p. 10, 7, 8.

Cape Colony created difficulties for Malawi litigants.<sup>1</sup> But it is not surprising that there were difficulties for the Supreme Court at Cape Colony because in most of the cases concerning Africans which would have gone there it would have meant that the Court would require African assessors as the law applicable was African Customary law under S.5 of the Supreme Court at Cape Colony, which was unlikely to be known by the Judges at Cape Colony. The situation might have been the same in that the judges at Cape Colony would have required the aid of assessors conversant with English Common law, as the judges of the Supreme Court at Cape Colony would be conversant with Roman-Dutch law.

Although there are no recorded cases of appeals in murder cases involving Europeans in the material used for this study, Johnston mentions that all murder appeals by Europeans had to go to Cape Colony,<sup>2</sup> and it may therefore be deduced that murder cases committed by Europeans were heard by the Supreme Court at Cape Colony before the establishment of the East African Supreme Court of Appeal in 1902. In addition there were travel inconven-

---

1. Murray, S.S., The Handbook of Nyasaland, op. cit. p. 147.

2. Johnston, H.H., British Central Africa. p. 154.

iences as communications were not advanced during this period. And this meant expenses which the African litigants unlike the European ones, were unlikely to afford. Above all it was unlikely that an African would know that such a right of appeal to Cape Colony ever existed as all the Proclamations were in English and unlikely to be known by Africans at this time. It was not surprising that the Commission which inquired about the causes of the Native Rising in 1915 recommended that Ordinances and Regulations should be published in local languages.<sup>1</sup>

The powers of the Supreme Court at Cape Colony which were extended to Malawi were replaced by the East African Court of Appeal whose appellate jurisdiction was extended to Malawi in 1902.

#### The East Africa Court of Appeal

The unsatisfactory results experienced with the Supreme Court of Appeal at Cape Colony were mitigated (but see p. 14) by the establishment of the East Africa Protectorates Court of Appeal, created by the British Central Africa Order in Council of 1902. The Court had criminal and civil jurisdiction of all persons and matters

---

1. The Report of the Commission to Inquire into the Causes of the Native Rising, op. cit., 1916, p. 7.

within the Protectorate. The powers of this Court were not changed by the 1907 Nyasaland Order in Council but this Order extended the powers of the High Court of Nyasaland situated in Nyasaland and created in 1902, whose appeals went to the East Africa Court of Appeal.

As in the case of the inconvenience experienced at Cape Colony it would seem that the litigants generally found it impossible in practice to appeal to the East Africa Court of Appeal for East Africa on the grounds that it was expensive for the African litigants to travel to the East Africa Court of Appeal which was situated outside Malawi. In addition, there do not appear to have been adequate channels through which the African litigants could appeal. As seen above, there was a right of appeal from the Sub-District Court to the District Court and from there to the High Court of Nyasaland.

The powers of the East African Court of Appeal as extending to Malawi, which was the highest court of appeal before the Privy Council for Nyasaland, were abolished by the 1947 East African Court of Appeal Ordinance. Its place was taken by the Nyasaland and Rhodesia Court of Appeal established in that same year. The new Court of Appeal had jurisdiction over the peoples of Southern and Northern Rhodesia and Nyasaland. This was supple-

mented by the Federal Supreme Court of Appeal, created by the Rhodesia and Nyasaland Federation Act 1953, s.46 1.

In 1963, the place of the Federal Supreme Court of Appeal was taken by the Nyasaland Supreme Court of Appeal for Nyasaland. The name for this court was changed from the Supreme Court of Appeal by the Malawi Independence Constitution, s. 79 1.

#### The High Court of Nyasaland

This was established by the British Central Africa Order in Council 1902. This was the last Court of Appeal in the Protectorate. But parties had the right to appeal to the Supreme Court at Cape Colony if they were not satisfied by the decision of the High Court of Nyasaland and later could have further appeal to the East Africa Court of Appeal after its establishment in 1902. The Court had jurisdiction over all persons in civil and criminal matters in the Protectorate and over all British subjects. The High Court of Nyasaland, apart from its appellate jurisdiction, had power to intervene in certain cases decided in the District Courts. It also had to confirm certain sentences passed in the subordinate courts.<sup>1</sup>

---

1. The Handbook of Nyasaland, 1908, p. 148.

Powers of Courts of Appeal to Call Assessors

All the courts of appeal under which British Central Africa Order in Council had a right of calling "native" assessors to aid them in rehearing or retrial of cases on appeal. The Ordinance does not state the qualification for assessors to the courts of appeal and it would appear from the Ordinance that the qualification was the same as under customary law, where they were qualified by custom in that they sat with the Chief and heard disputes and complaints from the people in the community.<sup>1</sup>

Although it is true that the same assessors as those who sat with the Chief under customary law sat on the courts of appeal, it is also true that their powers and influence were affected. With the Chief they were only to advise him in matters in which the chief himself was informed; whereas the District Commissioner, Provincial Commissioner or the judge of the High Court was generally not conversant with the custom and law of the people with whom he was dealing, nor did he know the customary law applicable to the case he was trying. It was necessary therefore that advisers helping the District Commissioners,

---

1. Report of the Commission . . . To Enquire into the Financial Position . . . of Nyasaland, op. cit., p. 338.

Provincial Commissioners or High Court judges should have been more conversant with customary law than those who advised the Chief in deciding the same cases, as upon their advice the weight of the court's decision lay. It is however necessary to add that the right to decide on such matters was the prerogative of the court; hence sometimes the opinions of the Africans were disregarded as repugnant to the cases in question. This prerogative was seen in cases of adultery committed by Africans and mwavi trial cases where, as seen in the eyes of the African adultery was a crime and not a civil wrong as in English law. In mwavi trials, death occurring from the ordeal was not a crime whereas it was so under English law. But the court had the prerogative to call the latter case manslaughter, and the former criminal as in African law. But this depended on the weight of the case as viewed by the court.<sup>1</sup>

The power of assessors, or pleaders as they were called in 1903, was confirmed in the 1903 High Court Ordinance. There were two classes of Africans who could help in the High Court as pleaders. The first group was that asked by the parties to a case. This was done gra-

---

1. Murray, S.S. Handbook of Nyasaland. op. cit. 1907. p. 147.

tuitously. Group two was that of any other person selected by the judge. There were no special qualifications required for the people, but they had to have good character and some experience of the law applicable to the case. The group which was selected by the High Court was paid by the Court.<sup>1</sup> This was extended by the 1908 Legal Practitioners Rules, by which the last group, i.e. the group selected by the judge in the High Court, was to pay a £1 fee to the Court in order to obtain allicence to plead in the High Court.<sup>2</sup> The rules regarding this group do not state whether these people after the payment of £1 were entitled to plead in any case in the High Court, or whether this was to be done at the request of the High Court Judge as was under the 1903 High Court Ordinance. The distinction seems to be that by the 1903 High Court Ordinance they were paid remuneration at the discretion of the judge, but by the Legal Practitioners Rules of 1908 they were to be paid as a right, and this seems to be so in every case they pleaded.

It is interesting to note that group one is

---

1. British Central African Gazette, October 31st 1903, No. 155, Vol. X.10, p. 148.

2. Legal Practitioners Rules 1908, Nyasaland Government Gazette, Vol. 15, No. 6, 1908, p. 86.



similar to the family head or any member of the family or anyone below him to whom he stood in loco parentis. Such matters usually took place between the father (and) or for his wife, children, sister or mother, and in the olden days it appears that the master did so for his slaves, and it was also so enacted in the Ordinance of 1903. The second group is similar to the system called, under customary law, court advisers, or the aphungu. They were termed differently by various tribes; the Angoni termed them the nduna; they were Makambala among the Ngonde and sometimes termed by the Chewa as ankhsowe of the court. In all cases these terms were qualified by the word "of the court" - of the "BWAIO". The people in this capacity had usually to be members of the chief's household. Sometimes they were selected for their special knowledge. But the irregularities existing in customary law which were used by African pleaders (called the Aphungu) induced the British Administration to regulate such procedure to be followed by the African pleaders, which was contained in the High Court Practice and Procedure Ordinance of 1906.

The High Court Practice and Procedure Ordinance,  
1906

The Ordinance was introduced to regulate the

mode of giving evidence by African witnesses. As under customary law, they were examined orally in public. But in grave cases they were examined in secluded places. The court was presided over by the High Court judge if it went there on appeal.<sup>1</sup> This system of examining witnesses, under this Ordinance, was also used in lower courts where a Chief or a Principal Headman was presiding. The main difference between witnesses giving evidence under customary law and those giving evidence in magistrates courts is that in the latter case they were not afraid of giving evidence in open courts, in that they were usually protected by the courts themselves, and anyone attacking or abusing them after giving evidence was liable to punishment. Under customary law such protection was not available, and it was sometimes necessary for the witnesses to hide themselves in a nearby place or in a tree overlooking the Bwalo, where they could not be seen. From these hidden places the witnesses shouted loud enough to be heard by the court.<sup>3</sup>

---

1. The High Court Practice and Procedure Ordinance, British Central African Gazette, 1906.

2. See Under Procedure. Chapter IV. Part I.

3. Gamitto, Chief Kazembe, Vol. II, op. cit. p. 148.

The witness did not give his name in open court but had already seen the court before the proceedings and was known to the court and the advisers.

#### Other Courts of Appeal

By virtue of the Africa Order in Council of 1889, Nyasaland became a Protectorate of Her Majesty and in consequence the people became her subjects. This entitled them to have access to the courts whose jurisdiction extended to the Colonies. The highest court of appeal was the Privy Council. But due to the difficulties and expenses involved there does not appear to have been any African appeal to the Privy Council.

As in all cases of High Courts outside Malawi there were the inconveniences on the part of African litigants to exercise their right of appeal to higher courts than those in Malawi for reasons explained in the case of the Supreme Court of Appeal of Cape Colony and the East Africa Court of Appeal. By 1933 there were no cases taken to the Privy Council by African litigants although they had such a right, had they an opportunity to do so.

## CHAPTER VIII

### NEW OFFENCES

#### Trial by Mwavi

Under customary law trial by mwavi was the last court of appeal. This meant that the chief was not, in this regard, the highest authority in the community. Many innocent people were asked to take mwavi and many lives were lost in this way, by this poisonous substance.

When the Collectors and Consular Courts were established it was stated that they were to deal with most cases involving Europeans and Asians. But they were also to deal with cases where Africans and Europeans were parties to the action. By 1893 it was felt that although hereditary chiefs were to deal with minor cases involving Africans it was considered necessary that serious cases though involving Africans should be dealt with by Collectors.<sup>1</sup>

As mwavi was felt to be a serious offence during the British administration, it was taken for granted that

---

1. Johnston, H.H., British Central Africa, op. cit., p. 114.

the collectors would deal with such offences. However, they had to get the sanction of the Commissioner at Zomba in order to impose the death sentence on any offender. Thus it is not surprising that for twenty-one years since the establishment of the government there was no ordinance passed to regulate the offence of mwavi trial.

Offences of mwavi trial increased day by day and it was estimated that about half of the whole population of Malawi died as a result of this trial.<sup>1</sup> Such a serious situation necessitated vigorous legislation to guide the magistrates in trials of such offences, for it was so widespread that it even penetrated to the towns where Africans lived in European quarters. The punishment of mwavi trial was contained in the Witchcraft Ordinance of 1911. There were three categories of such offences:-

- (a) Any person who instigated the trial of mwavi or boiling water which resulted in the death of any person was liable to ten years' imprisonment.
- (b) Any person who aided or abetted members of such a trial was sentenced to life imprisonment.
- (c) Any persons who were witnesses to such a trial

---

1. Duff, H.L., Nyasaland under the Foreign Office, op. cit., 1906, p. 319.

were liable to a fine of up to £5.

The aiders and abettors were those who either sold mwavi substances to the diviners or allowed his house to be used as a place for such a trial.

The class of aiders and abettors included those who helped in the employment of the diviners but who were fined £25 or imprisonment not exceeding three years.

As stated above during the British administration trial by mwavi was considered one of the most serious offences and that is why its punishment was so severe.

The class of aiders and abettors included chiefs, who aided or abetted the diviners. If such offences were committed within their jurisdiction, such chiefs were made liable to a fine not exceeding £25 or imprisonment not exceeding five years.<sup>1</sup>

It was important that the chief himself should be punished severely because it was he who gave the right to trial by mwavi. Hence if the chief had forbidden any such trials it would expedite the disappearance of this crime and eliminate the necessity for criminal investigation.

Under customary law mwavi trial was sometimes

---

1. Witchcraft Ordinance, 261, Vol. XVIII No. 7, p. 100, 1911.

seriously abused where for instance diviners were bribed by the plaintiff in order to make sure that his opponent would meet with his death.<sup>1</sup> But the fear of such death resulted in some of the accused bribing the diviner in order to reduce the poisonous substance and avoid fatality.<sup>2</sup>

In such cases it was important for chiefs in the areas where trials were abused to refuse permission for such trials within their jurisdiction, on the ground that it was being used as an abuse because certain people unnecessarily administered it and in some cases it was being administered because of personal hatred.<sup>3</sup> The Ordinance was therefore not imposing a new obligation on the chiefs, especially those who did previously exercise their power of regulating such trials. The difference however between the restrictions put by the 1911 Ordinance on the chiefs was that the chiefs were punished if they gave permission to diviners to conduct such trials within their jurisdiction, whereas under customary law there was no such punishment if a village

---

1. Duff, H.L. Nyasaland under the Foreign Office, op. cit., p. 321.

2. Ibid., p. 321

3. Interview - Chief Chakhumbila.

headman or chief refused to give permission for such trials.

Between 1911 and 1929 there were found to be an increasing number of deaths by mwavi occurring in the villages. And this necessitated a further amendment to the Ordinance.<sup>1</sup> In addition to the powers given to the magistrates by the 1911 Ordinance, it was found necessary that the Governor should be given absolute power to intervene whenever it was necessary to supervise the working of the Ordinance.<sup>2</sup> For in spite of the 1911 Ordinance there were cases in the villages whereby Africans secretly administered mwavi poison as the last court of appeal, and these necessitated the changes in procedure and punishment contained in the 1929 Ordinance, whereby parties to such an offence were liable to seven years' imprisonment if that trial resulted in death or physical injury.

The 1911 Ordinance fixed the sentence to ten years but the 1929 Ordinance reduced it to seven years. The reasons as given to the Legislative Council of Malawi that year, were that there were many cases originating

---

1. Witchcraft (Amendment) Ordinance 1929, Nyasaland Government Gazette, May.

2. Ibid



from the mwavi practices. And it was felt that if the sentence was reduced it would be possible to imprison more offenders. It was further stated in the same Legislative Council that these offenders repeated the offence as soon as they returned from prison, and therefore had to be imprisoned again for seven years, but not ten years, and in order to try and break down this deepseated belief in mwavi the legislators found it more profitable to have a shorter term of imprisonment as the prisons could not accommodate so many offenders at once.<sup>1</sup>

It has been stated that employing or conspiring with diviners for the purpose of trial by mwavi was also made an offence punishable with life imprisonment,<sup>2</sup> by the 1929 Ordinance. It is interesting to note here that the principal offenders, i.e. the diviners themselves, received lesser punishment than those who only conspired with or employed them to administer the mwavi for the latter were sentenced to life imprisonment while the diviners were themselves imprisoned for up to seven years by the 1929 Ordinance. The latter group encouraged

---

1. The Proceedings of the Nyasaland Legislative Council, May 1929, Nyasaland Government Gazette.

2. Ibid.

the continuance of witchcraft by employing them after it had been declared illegal. Hence it was felt that it would be more convenient for the Government to prevent the further commission of this offence if the diviners were not received in the villages as the practice would fall into decay for lack of "customers".

Under customary law diviners were recognised as members of the community. It was necessary, however, that their acts should show that, their interest was to suppress the evil activities of the community and of bad people against the innocent ones.<sup>1</sup> It was on this ground that mwavi was so depended upon by the innocent members of the community, whether they were the accused or the complainants. Hence it is necessary to note that mwavi trial was not only used by the diviner in order to detect a wrong-doer but was also used by classes such as a husband against his wife in adultery cases or by the Court itself in order to prove cases such as rape, theft, murder<sup>2</sup> and other minor offences.

Such innocent members of the community took mwavi in order to prove their innocence. And although there was

---

1. Livingston, P.W., Nyasa the Great Water, op. cit. p. 23.

2. Duff, H.L. Nyasaland under the Foreign Office, op. cit., p. 319.

apparent chances of bribes in the administration of mwavi, the practice had been so prescriptive that the community did not hesitate to ask for it whenever it was necessary in their lives. And it was not surprising that P.W. Livingston should have noted with great concern at Likoma that bad or bribed diviners, if discovered or found to be pointing at innocent people, were burnt to death.<sup>1</sup>

In addition it is important to note that this practice was without any scientific basis and it could not have been discovered how poisonous any amount of mwavi substance could be. Thus when the Ordinances were passed to abolish the functions of this class, i.e. the diviners, the people's minds were awakened to doubt the sincerity of witchcraft; although it is important also to note that in spite of the Ordinance in 1911 there were still secret practices of mwavi, hence the introduction of a further Ordinance over the same offence in 1929, and which proves that the community still believed in it. It is to be noted here that chief's power over witchcraft was to some extent affected as the mwavi trial could only take place with his permission.<sup>2</sup> A further point was that the chief's

---

1. Livingston, P.W., Nyasa the Great Water, op. cit., p. 23.

2. Interview with Chief Chakhumbila.

power in regard to the mwavi trial was overridden by the Witchcraft Ordinances, hence in the eyes of his people he was an ordinary citizen if he could not protect the interest of his people against another authority above him in the community.

To these general effects of the mwavi trial one should emphasise that its suppression involved the overthrow of one of the strong sanctions of the long-standing traditions of Malawi people, which although producing evil results was strongly believed by the members of the communities, and where the diviners and sourcerers were sometimes more important people in the community than the Chiefs.<sup>1</sup>

#### Ordinances to Regulate the Intoxicating Liquor

Under customary law beer drinking was not prohibited for this was one of the means from which people derived enjoyment in their social gatherings. What customary law objected to was drunkenness, and infants were not allowed to drink.<sup>2</sup>

The matter of beer drinking by Africans was of concern to the missionaries more than to the Government.

---

1. Macdonald, Duff, Africana. Vol. 1. op. cit. p. 158.

2. Ibid. p. 173.

The missionaries explained that beer drinking affected the members of their denominations. The question was introduced by the Rev. Dr. Hetherwick who was the spokesman for other missionaries in the Legislative Council and who was an unofficial member of the Legislative Council. He was particularly concerned over the beer being sold in public in Blantyre areas. He emphasised the fact that he was not against beer drinking in itself but in its consequences as it was so freely sold and bought, especially as in most cases it was sold in market squares. In his speech in the Legislative Council he requested the Government to look into the matter urgently. The acting Governor of Malawi (Nyasaland) stated that such power was entrusted to District Residents and magistrates who were proper administrators of that matter.<sup>1</sup>

The question of beer drinking had been dealt with and disallowed in some areas earlier than the discussion above. Thus in Fort Johnston district a Town Council Ordinance stated that no "native beer shall be made, sold, or conveyed within the Township boundaries".<sup>2</sup>

The wording of the Fort Johnston Town Ordinance

- 
1. Minutes of the Legislative Council, Nyasaland Government Gazette (Supplement) 24th May, 1910, p. 5.
  2. Nyasaland Government Gazette, Vol. XVII, No. 10, 1910, p. 93.

(i.e., no beer shall be made, sold or conveyed within the Township boundaries) was so wide that it was practically impossible for any African member of such a town to have any access to the drinking of his traditional beer, and it meant leaving the town to go to a nearby village if such an African had to take any beer at all. And this was the practice in many other towns, such as Blantyre, where a bye-law of 1913 stated that "No native beer was to be sold or conveyed or consumed within the township of Blantyre".<sup>1</sup>

It is not surprising that many African workers in the towns were not to be found in these areas even during working hours on Saturdays as there were no sources of pleasure for them. Drinking was a strong custom in the villages and its absence in towns drove them back to their villages where such drinks could be obtained.<sup>2</sup> However it is surprising that the 1916 report on the native rising does not list beer drinking as an undesirable restriction on the African community, although it found it necessary to list the removal of certain restrictions on the African people such as the wearing of European clothes by the

---

1. Nyasaland Government Gazette, 288, Vol. 20, No. 2  
(Blantyre Township Bye-Laws,) 1913, p. 32.

2. Interview: J. Rodger, a retired Scottish Missionary.

African people.<sup>1</sup>

### Rules Regarding Hunting

Under customary law it was permissible for any member of the community to hunt within his chief's area.<sup>2</sup> To hunt outside his chief's jurisdiction he needed permission from that chief.<sup>3</sup> Young sons-in-law took pride in hunting and killing wild animals, upon which they would give part of the meat to their fathers-in-law or their chief and receive praise from their "ankhoswe".

Under the British rule this right was curtailed and regulations imposed in regard to hunting. The 1911 Ordinance on this subject made it an offence punishable by a fine of £1.<sup>4</sup>

Before the Ordinance was passed to restrict hunting it was stated by Judge Nunnan in his report of February 1904 that the main reasons for restricting cutting of timber by the African people was to prevent flooding of

1. Report of the Commission Appointed to Enquire into various matters and questions concerned with the Native Rising (6819), Zomba, Nyasaland, 1916, p. 7.
2. Livingstone, David & Charles, The Zambezi and its Tributaries, op. cit., p. 259.
3. Macdonald, Duff, *Africana*, Vol. I, pp. 179-80.
4. Nyasaland Government Gazette, 261, Vol. XVIII No. 7, p. 96, 1911 (Ordinance Prohibiting Hunting).

the land, and that when Africans went for hunting they often cut timber<sup>1</sup> hence it was necessary to restrict hunting.

The Ordinance met with resistance from the African community, who stated that they were deprived of their customary rights. And it is not surprising that the Commission of Enquiry into the Causes of the Native Rising in 1916 should have listed prohibition of hunting as one of the grievances of the African people, and consequently contributing to the rising,<sup>2</sup> for in an African community hunting was an important social activity as well as an economic factor, for it provided an economic means for the maintenance of many families. It can also be argued that other than preserving the game and the reasons given by Judge Nunnan, there does not seem to have been any urgent necessity which entitled the Government to prohibit the hunting of game in all areas, considering that this had been a long-standing custom of the people which also brought them economic benefit.

---

1. Judgement of Judge Nunnan of the Supreme Court of Nyasaland found in C.O. 525/4.

2. Report of Enquiry into the Causes of the 1915 Rising, op. cit., p. 7.



### Seditious Publications

The crime of seditious publications became of importance after the rising of 1915 when followers of John Chilembwe were found in possession of such publications. Even in this case evidence at the trial of Chilembwe revealed that such publications was brought into the country from Dar-es-Salaam.<sup>1</sup>

The power prohibiting such publications was applicable to both African and European communities alike. This was contained in the 1917 Seditious Publication Ordinance.

People found guilty of seditious matters were sentenced to two years' imprisonment and seven years if it was a second offence.

An interesting point about seditious matters was that although seditious publication was a new offence the idea behind it was not a new offence to Malawi communities because of its political nature. Possessing seditious publications was of course not an old practice, as these people could not read or write such matters. But its political nature was always an offence in certain

---

1. Maugham, R.S.C., Nyasaland in the Nineties, p. 57 1935 (also discussed in Shepperson & Price, Independent African, p. 390).

societies of Malawi as it was listed under treason cases against the chief. And it has been discussed earlier that at Mponda in Fort Johnston and in Karonga at Kyungu's Court treason cases were tried. Most of them of course were for committing adultery with the women of the chief's household. But at Kyungu's Court treason was not only restricted to adultery cases with the chief's wives but indeed included cases against Kyungu's authority.<sup>1</sup>

Looking at the new offences closely one wonders whether they were really new offences, or whether they were only made "new offences" by the foreign administration, because of the introduction of the method of their sanctions, by them, as these offences were known to these communities. Hunting was for instance not an offence but as a right whose punishments in case of their breach were not expressly provided for.

It was stated by Livingstone in his discussion on hunting that although people were free to hunt anywhere this was only possible if the hunter was a member of that community and that if he was not a member he could only

---

1. Wilson, G., "The Constitution of the Ngonde" Rhodes Livingstone Papers, 1939, p. 49.

hunt with the permission of the chief of the area.<sup>1</sup> It would appear therefore that hunting out one's jurisdiction without permission was a wrong.

Whenever there are rights bestowed on a community, there are usually laws provided, which govern the exercise of those rights, and these laws often provide a means by which a defaulter of such rights could be punished. Surprisingly enough, it has been noted that under customary law in Malawi there were no laws in connection with these hunting rights within one's area of jurisdiction. To this view it can be argued that there was no need for laws to be imposed on the natural rights of a community to which the chief and the community did not make.

In connection with the Ordinance regulating intoxicating liquor, it was discussed in dealing with beer drinking in Part One that although beer drinking was allowed under customary law, it did not allow any member of the community to get drunk and become a nuisance to his community.<sup>2</sup> It is therefore submitted that what the new law did was to extend restrictions in beer

---

1. Livingstone, David & Charles, *The Zambezi and its Tributaries*, op. cit., p. 289.

2. Macdonald, Duff, Africana. Vol. 1. p. 173.

drinking not only where the citizen might get drunk but the entire subject matter of beer drinking. The possibility of people getting drunk being unnecessary. It can therefore be called a new "offence" in regard to the extension of the laws governing beer drinking. In addition it has been noted that under customary law the offences dealt only with certain classes in the community such as infants. Hence it was not an offence for adults to get drunk provided they did not disturb other members of the community. Hence in practice the customary laws affected the brewer because he was always liable if people got so drunk as to be a nuisance to the community, where such a brewer had to explain to the court why the beer made it impossible for any member to be incapable of taking care of himself.

As it has been noted, infants were not allowed to drink at all. Under customary law they were again affected under the Ordinance regulating liquor. Thus as was the case under the rules of hunting the new intoxicating law merely extended the scope of its punishment and extended it to all classes in the community.

It has been stated in dealing with sedition matters that the offence was not new as such, because of its political nature, and that what was new was the

extention of the method by which that offence might be committed; namely its publication, which was not known to African communities. The reason as stated above, being that the African people could not write before the introduction of schools in Malawi.

In regard to mwavi trials the offence can only be called a new offence on the ground that its existence was completely wiped out, but even under customary law its use was allowed only if it did not endanger innocent members of the community. A rule of customary law was that all bad diviners were to be burnt alive,<sup>1</sup> and certain chiefs disallowed its use in their jurisdiction once it was discovered that the diviner had intended to abuse the practice. Hence as was the case in most cases of new offences, the Ordinance merely suppressed the entire existence of the Mwavi trial practices as stated above.

---

1. Johnston, P.W., Nyasa the Great Water, op. cit., p. 23.

## EPILOGUE

It is often dangerous to make generalizations about a custom of a particular people as the law that governs them, the reason being that a custom cannot become law unless it is widely accepted and practised by the majority of those people. However, the argument contained in this thesis has aimed to prove that the Malawi customs did have the effect of law on the people, and this has been discussed in detail in Part One of this Study, where it was stated that certain customs such as bride price, where it was practised, were adhered to as law binding them. Among the Ngoni the custom of enforced widowhood was observed with extreme rigidity, and although it was not too fair a rule for the widow, it was a law to be observed by them.

Mwavi ordeal, the so-called last court of appeal, did not, as a matter of fact, prove the innocence of the litigants, as most of them in putting their innocence to the test succumbed to the fatal mwavi. Nonetheless such a practice was the law of the day. The following are the grounds upon which this thesis has based its argument:

1) That the Malawi customs, though scattered, were widely accepted and practised by the people.

2) That though there were inter-tribal wars, they merely resulted in a temporary suspension of such laws, the reason being that the victorious tribes themselves were never completely alien but came from the same racial stock with similar backgrounds and rules of conduct, except when the defeated groups were sold into commercial slavery to the Arab slave traders.

In dealing with the customary laws of Malawi in Part One it was noticed that in the discussion of the people of Malawi there were accepted customary laws which governed them. But in addition to these existing laws there was introduced with British rule a new body of laws which was to govern the public relations of the Malawi people. It was therefore obvious that there would be a conflict of laws between those of the Africans and those introduced by the British Administration.

When Nyasaland became a British Protectorate under Sir Harry Johnston he stated that the Malawi chiefs were to administer minor cases involving Africans, whereas serious matters involving Africans were to be dealt with by the European magistrates.<sup>1</sup> Serious

---

1. Johnston, H.H., British Central Africa, op.cit., p.114.

matters in this context meant any offence which affected the keeping of law and order by the British administration, but did not affect the private relationships of the Africans. However, capital punishment could not be imposed on Africans by magistrates unless the Commissioner at Zomba had given his sanction. Nor could it be imposed on Europeans until the Supreme Court at Cape Colony had given its sanction.<sup>1</sup> Although mwavi, Administering Poison, was not expressly stated to be a serious crime, it was considered to be so once injury had resulted after its intake, because it affected life and hence its punishment was often capital. However it was stated that as the intention to kill was lacking, such offence once proved was reduced to manslaughter.<sup>2</sup>

In discussing the conflict of laws which was inevitable in Malawi it is important to consider what exact laws were involved. Looking at the Ordinances of the forty-year period which this study has examined, it has been noted that all the customary laws which were affected were those which directly or indirectly

---

1. Johnston, H.H. British Central Africa, op.cit., p.154.

2. Murray, S.S., Handbook of Nyasaland, Zomba, 1907, p.149.



might encroach upon British authority. This meant that native law which did not endanger the administration of law and order was to be left intact. This provision was contained in Section 20 of the "British Central Africa Order in Council, 1902".

The people who were to come under this provision included all British subjects and all Africans whether alien or indigenuous, who by virtue of the Africa order in Council, 1889, were deemed to be under British Protection and all foreign Europeans whose nations were signatories to the Berlin Conference of 1885 under s.35 of that Conference.

The hereditary chiefs were the machinery of justice for customary law and it follows therefore that their power which governed criminal or public matters would directly be suppressed to enable the foreign administration to effect its laws.

This resulted inevitably in the destruction of most of the important customs of the Malawi people. The first step in this process was the establishment of the Consular and Collector's Courts which replaced the functions of the chiefs in various areas leaving the chiefs holding merely nominal power. The final effective blow ending in the destruction of the administrative functions of the chief was the replace-

ment of hereditary chiefs by the officers created by the British administration, namely the Principal Headmen, who were to take over the hereditary functions of the chiefs, but who by custom had no legal rights whatsoever to exercise such power over the people, whether of the same kinship or not. Such a system was effective for the British administration, in that it weakened, if not completely destroyed, the feelings of allegiance and loyalty that the people bore by tradition towards their chief<sup>1</sup>; and by so replacing the traditional chiefs with usually a member of the Chief's household, the British administration was successful in pacifying the Malawi people and thereby preventing a wide-scale rebellion, which may have flared up if such traditional power was usurped by a completely alien group. In addition, land, held by the chief according to tradition, which was the main source from which he derived his power, was taken away from him through the system of the "Certificates of Claims", thereby leaving him a defenceless and powerless citizen of the community and by this period a subject of the British Crown. Again, in creating the system of Principal Headmen, it was sometimes

---

1. Macdonald, Duff, Africana, Vol. I, p.154.

necessary for the administration to create a new boundary disregarding the traditional one. Thus people who, by tradition, lived on the land of their chief could find themselves under a Principal Headman who was not originally their Headman, thereby weakening their ties and duties to their hereditary chiefs, as in this case they (the chiefs) would no longer have power over their people, the latter no longer living in his domain but in a different territory. Apart from this boundary system, there were other forms which the British administration adopted to uproot the strong indigenous government under hereditary chiefs who enjoyed the power of life and death over everyone living within their domains.<sup>1</sup>

In order to maintain long undisputed sway over the chiefs and to endow all their actions with the aura of legality, the British administration under the consularship of Sir Harry Johnston entered vague agreements with the chiefs, which were termed treaties. These treaties, obviously, could not be correctly termed as such, as the element of understanding, being one of the essential factors constituting an agreement a valid one, was lacking in the execution of such treaties. It has been noted, when discussing the

---

1. Macdonald, Duff, Africana, Vol. I, op. cit., p.154.

loss of the powers of the hereditary chiefs during the British administration, that the majority of the chiefs simply made over their supremacy and sovereignty rights to the British Crown without any reservations. The explanation of such executions of treaties on the part of the chiefs can be attributed to their innocence, stemming from their ignorance of the matter, which was not, obviously, sufficiently explained to them before completely executing the treaties.

It is on the above-mentioned ground that, in discussing the treaties, the British officers who signed such treaties cannot but be described as displaying blatant dishonesty.

The consequences of such treaties can be seen even today in Malawi under African leadership, when it is not possible for the rightful heirs of the chiefs to claim their traditional rights in land, due to the fact that such rights because of long-standing legal title, though wrongly obtained, have now by custom and long usage become government property.

In addition to treaties there were other forms by which land was taken from the chief's position. This was what the Nyasaland administration termed Queen's Regulations. These merely legalised the

old practice which had existed for leasing and selling Crown lands to the European settlers.<sup>1</sup> This system also helped the administration to raise enough revenue for the Protectorate for the finances were dwindling.<sup>2</sup>

After the signing of such treaties and the establishment of British administration in Malawi, that administration commenced passing ordinances which had the effect of weakening and ultimately destroying the ties that existed between the chiefs and their people as well as their customs. The fact that such ordinances were issued without the knowledge of the chiefs makes it clear that they were meant to be detrimental to the powers of the chiefs. Another supporting fact is that these ordinances were published in the English language, a fact which was strongly criticized by the 1916 Commission which inquired into the causes of the Native Rising~~u~~ in Malawi.

The discussion above shows how the customary laws were weakened, destroyed, or modified.

- 
1. F.O. to Sharpe 21.1.95. Also see Krishnamurthy, B.S., London Ph.D. Thesis: Land and Labour 1964, p.151.
  2. Krishnamurthy, B.S., London Ph.D. Thesis: Land and Labour 1964, p.151.

It has been stated that transactions only demonstrate where the existing customs endangered the alien government in Malawi. Hence it will be incomplete for this Epilogue to disregard the fact that private or family law was left intact whenever possible, as was contained in s.20 of the 1902 Order in Council. It was on this ground that the Christian Marriage Ordinance of 1902 and 1905 stated that the rights of parties to a marriage before the Ordinance was passed were not to be affected. In other words, the Ordinance was protecting the rights of wives previous to the Ordinance but did not recognise them as wives for the purpose of the Ordinance, hence enabling a man to take another wife under the Ordinance which was considered to be his legal wife, but not the other customary rights were recognized. Nor could he re-marry once married under the Ordinance for this would be bigamy under the Ordinance. Although the procedure of keeping previous wives was not 'moral' according to British standards, it was permitted as it did not conflict with the everyday administration of law and order. Again, it was on this ground that adultery by the African people under the Ordinance was administered by the rules of customary law where it was understood

to be a criminal charge<sup>1</sup>; whereas under English law this was a civil matter but contrary to the civil standard of proof, adultery in a divorce case must be proved beyond reasonable doubt.

In conclusion, it will be noted that the following matters only were affected and thereby modified or abolished:

- (a) The administration of land. It was necessary for the British to have control over land in order to administer new land laws. This affected all the people on that land; hence it included
- (b) The chief's powers over these people as far as those powers dealt with the public aspect of the community, which included the administration of criminal cases. Hence the introduction of the Principal Headmanship system 1912 as extended by 1923 and 1933.

It is therefore to be noted that the following laws were not affected unless they were contrary to the administration of public law:

- (a) Customary laws of various social groups:
- (b) Religious laws of various communities such as Islam.

---

1. Murray, S.S., Handbook of Nyasaland, op.cit., 1907, p.149.

Although it is true that the British administration aimed at weakening the tribal system of customary administration of government, it is also important to state that there were certain codes of behaviour which had to be done away with. Thus it has been noted that certain ordinances afforded security for the people during this unsettled period, due to the waging of tribal wars and the extensive practice of slavery by the Arab slave traders. But in areas ruled by militarily strong chiefs, such danger to life was not so grave as the people, once under the protection of their chief in his domain, were secure from the attacks of enemies.

Apart from fears of the enemy outside one's chief's domain, there were other factors that made life insecure for them. Thus it was not until mwavi trial was abolished in 1911 and 1929 by the Witchcraft Ordinances that the people were relieved of the ever-existing fear of the mwavi trial, as well as of the giving of evidence in trials, in that they were no longer afraid of being persecuted by the contending parties: for to do so was illegal under the High Court Procedure and Practice Ordinance of 1906 which protected witnesses giving evidence in any court in the Protectorate.



In regard to the law of persons under customary law, it was found that the British administration avoided conflict by modifying them. This modification of the law of persons has been discussed in detail in Chapter II of Part Two. Thus it has been noted that the status of lunatics was greatly improved, in that they came to have advanced and effective medical treatment, and were no longer deemed dangerous or social outcasts who had, in the past, been confined in wooden stocks.

Another improvement was brought in relating to the administration of prisons. Under customary law imprisoning a person as a form of punishment was not practised. In its place there was the system of compensation or payment of lipo, failing which the wrong-doer was made a slave, or alternatively his surety, who stood for him in loco parentis, would be reduced to slavery until such time as his relatives could redeem him. Such unnecessary methods which reduced a respectable member of the community to slavery were eliminated by the Prison Ordinance of 1905 and 1912.

The positions of both women and infants considered in the light of wrong-doers were affected, in that under customary law, people who stood for them

in loco parentis were held liable for their offences, and now they themselves were liable; in the case of infants, this refers only to those who were aware of the wrong nature of their act. However, even under customary law regarding infants, habitual delinquents were punished severely.

Finally, the court's fees which had been introduced by the new administration were of importance because they lessened the possibility of the abusive practice of making gifts to court officials as a token of respect, which was previously, under customary law, an accepted court procedure, as such tokens were in the nature of fees which were not introduced by the Ordinance of 1933 and the Nyasaland Local Ordinance of 1962.

ABBREVIATIONS.

A.L.C.	African Lakes Company, later African Lakes Corporation
B.C.A.	British Central Africa
B.S.A. Co.	British South Africa Company.
C.O.	Colonial Office
D.C.	District Commissioner
D.R.	District Resident, later District Commissioner
F.O.	Foreign Office
J.R.A.I.	Journal of the Royal Anthropological Institute
J.R.G.S.	Journal of the Royal Geographical Society.
J.R. Soc. Arts.	Journal of the Royal Society of Arts
J.R.C.I.	Journal of the Royal Colonial Institute
N.A.	Native Authority
R.N.L.B.	Rhodesia Native Labour
P.C.	Provisional Commissioner
W.N.L.A.	Witwatersrand Native Labour Association

## SOURCES.

### A. Public Record Office.

The Foreign Office, African Series, F.O.2 and F.O.84.

The Colonial Office Series, C.O.525.

The Slave Trade Series, F.O.84.

### B. Commission Reports.

1895-1919 Report of the Trade and General Conditions of the Protectorate.

1904 Correspondence Relating to the Recruitment of Labour in B.C.A. Protectorates, Cmd 1531, 1903; Cmd 1950, 1904.

1916 Commission Appointed to Enquire into the Causes of the Native Rising.

1921 Report of the Commission to Enquire into Matters Connected with Occupation of Land. Cmd 10582.

1925 Report of the East African Commission, Cmd 2387.

1928-9 Report of the Commission on the Closer Union of the Dependencies in East and Central Africa, Cmd 3234.

1935 and 1937 Report of the Committee Appointed to Inquire into Emigrant Labour, and that of 1937 led by J.C.Abrahams.

1938 Report Agricultural Survey of the Five Most Northerly Districts of Nyasaland.

1938 Report of the Commission Appointed to Enquire into the Financial Position and Further Development of Nyasaland, Colonial No. 152, Cmd 49493.

- 1939 Report of the Royal Commission on the Closer Association of Rhodesia and Nyasaland, Cmd 5949 (The Bledsloe Report).
- 1946 Report of the Nyasaland Land Commission (The Abrahams Report) Cmd 5949.

C. Published Books.

- Abdula, Yohanna B. The Yaos, tr. and ed. by Meredith Sanderson, 1919.
- Barnes, B.H. Johnson of Nyasaland, U.M.C.A. 1933.
- Barnes, J.A. Politics in Changing Africa, 1954.
- Buchanan, J. The Shire Highlands, 1885.
- East African Letters, 1880
- Buel, R.L. The Native Problems in Africa, Vol. I. 1928.
- Chadwick, O. Bishop Mackenzie's Grave, 1959.
- Cardew, C.A. Nyasaland in the Nineties. 1955.
- Chibambo, Y.M. My Ngoni of Nyasaland, tr. by Charles Stuart.
- Chirnside, A. The Blantyre Missionaries Discreditable Disclosures 1880.
- Clegg, E. Race and Politics, 1960.
- Clutton-Brock, Guy Dawn in Nyasaland, 1959.
- Cohen, A. British Policy in Changing Africa, 1958.
- Colson, Elizabeth and Gluckman, Max (editors) Seven Tribes of British Central Africa, 1951.

- Coupland, Sir R. With Kirk on the Zambezi, 1928.
- The Exploitation of East Africa 1856-90. 1939
- Debenham, Frank Nyasaland - Land of the Lake, 1955.
- Duff, H.L. Nyasaland under the Foreign Office, 1903 and 1906 editions.
- Elmslie, H.A. Among the Wild Ngoni, 1901.
- Fortes, M. and Evans-Pritchard, E. African Political Systems, 1940.
- Fotheringham, L.M. Adventures in Nyasaland, 1891
- Fraser, Donald Winning a Primitive People, 1914.
- Africa Idylls, 1923.
- Gamitto, A.C.P. King Kazembe, Vol. 1. Translated by Ian Cannison, 1960.
- Gray, J.R. The Two Nations. 1960.
- Griffin, C.S. Ordinances of the Nyasaland Protectorate, 31st. March, 1913, 1923.
- Hailey, Lord An African Survey, 1957.
- Native Administration in British African Territories, Part II, 1954.
- Hanna, A.J. The Beginnings of Nyasaland and North Eastern Rhodesia, 1859-95, 1956.
- The Story of Rhodesia and Nyasaland, 1960.
- Hertslet, C. The Map of Africa by Treaty, H.M.S.O. 1909.
- Hetherwick, A. The Romance of Blantyre

- Hinden, R. Plan for Africa, 1941.
- Hine, J.E. Days Gone By, 1924.
- Hodgkin, T. African Political Parties, Penguin African Series, 1961.
- Huxley, E. Four Guineas, 1954.
- Jack, J.W. Daybreak in Livingstonia, 1928.
- Jeffries, C.J. The Colonial Empire and its Civil Service, 1928.
- Johnston, A. The Life and Letters of Sir Henry Johnston, 1928.
- Johnston, James Reality versus Romance in Central Africa, 1893
- Johnson, H.H. British Central Africa, 1897.
- The Story of My Life, 1923.
- Krishnamurthy, B.S. Land and Labour in Nyasaland, 1902-1911. London Ph.D. Thesis 1964.
- Langworthy, Emily Booth This Africa was Mine, 1952.
- Livingstone, David and Charles Narrative of an Expedition to the Zambezi and its Tributaries, 1855-1864, 1865.
- Livingstone, W.P. Laws of Livingstonia, 1921.
- A Prince of Missionaries, The Rev. Alexander Hetherwick, 1931.
- Nyasa the Great Water, 1922.
- My African Reminiscences, 1934.
- Lugard, F.D.P. The Dual Mandate, 1926.
- The Rise of Our East African Empire, 2 Vols. 1893.

- Macdonald, Duff Africana or the Heart of Heathen Africa, 1882.
- Macmillan, W.M. Africa Emergent, 1949.
- Mair, L.P. Native Administration in Central Nyasaland, H.M.S.O. 1952.
- Maugham, R.C.F. Nyasaland in the Nineties, 1934.
- Meek, C.K. Land, Law and Custom in the Colonies, 1946.
- Mills, D.S.Y. What We Do in Nyasaland, 1911.
- Mitchell, J.C. The Yao Village, 1956.
- Moir, F.L.M. After Livingstone, 1891
- Murray, S.S. A Hand Book of Nyasaland, 1907, 1922 and 1927, Zomba, Nyasaland.
- Norman, L.S. Nyasaland without Prejudice, 1934.
- Nthara, S.Y. Man of Africa, ed. T. Cullen Young, 1934.
- Oliver, Roland, Sir Harry Johnston and the Scramble for Africa, 1957.
- Orde Browne, J. The African Labourer, 1933.
- Perham, M. Lugard - The Years of Adventure, 1956;  
The Years of Authority, 1957.
- Plamenatz, J. On Alien Rule and Self-Government 1960.
- Poole, Wordsworth Doctor on Lake Nyasa, ed. by Gelfand, M.
- Rankin, D.J. The Zambezi Basin and Nyasaland, 1893.
- Read, M. The Angoni of Nyasaland, 1956.



- Read M. The Children of their Fathers, 1959.
- Rowley, H. The Story of U.M.C.A. 1865.
- Twenty Years in Central Africa, 1881.
- Scott, D.C. A Cyclopaedic Dictionary of Manganja Language, 1892.
- Scott, M.A. "A Time to Speak", Faber, 1958. periodical.
- Seaver, G. David Livingstone: his Life and Letters, Lutter & Worth, 1957.
- Sharpe, A. The Backbone of Africa, 1921.
- Shepperson, George and Price, T. Independent Africa, 1958.
- Swan, A.J. Fighting the Slave Hunter in Central Africa, 1910.
- Tew, Mary The Peoples of the Lake Nyasa Region, 1950.
- Van Velson, J. The Politics of Kinship, 1964.
- Werner, A. The Native Races of British Central Africa, 1906.
- Wenle, Karl Three Years in Savage Africa.
- Young, Cullen Notes on the History of the Tumbuka-Kamanga Peoples of Nyasaland, 1931.
- African Ways and Wisdom, Society of Christian Literature, 1937.
- Young, Cullen and Banda, K. Hastings Our African Way of Life, 1946.

D. Periodicals and articles.

British Central African Gazette, later Nyasaland Gazette (The Royal Commonwealth Society) 1889-1937.

The Church of Scotland Home and Foreign Mission  
Record 1890-1914 (British Museum).

Missionary Record of the United Presbyterian  
Church 1890 - 1914 (British Museum).

Zambezi Industrial Mission, Occasional Papers  
1893 - 1918 (British Museum).

Occasional Papers for Nyasaland, 1893 (Royal  
Commonwealth Society Library, London).

Proceedings of the Legislative Council of Nyasaland  
1908 - 1937 (British Museum).

- |                |   |
|----------------|---|
| Buchanan J.    | "Industrial Development of<br>Nyasa" in the <u>Tyne Geography</u><br>Vol. 2, 1892.                                    |
| -              | "Industrial Development of<br>Nyasaland" in the <u>Geographical<br/>Journal</u> , Vol. 1, 1893.                       |
| Chirnside, A.  | <u>The Blantyre Missionaries:<br/>Discreditable Disclosures,</u><br>Ridgeway, 1880.                                   |
| Hetherwick, A. | "Opening up Central Africa" in<br><u>the Journal of the African<br/>Society</u> , V. 2, 1902-3.                       |
| Johnston, H.H. | "England's Work in Central Africa"<br>in the <u>Journal of the Royal<br/>Colonial Institute</u> , Vol. 28,<br>1896-7. |
| -              | "British Central Africa" in<br><u>The Review</u> July, 1894.  |
| -              | "Protectorate of Great Britain"<br>in <u>Tropical Africa</u> , Vol. 18, 1902.   |
| Mitchell, J.C. | "The Political Organization of the<br>Yao of Southern Nyasaland" in<br><u>African Studies</u> , Sept. 1949.           |
| -              | "The Village Headman in British<br>Central Africa" in <u>Africa</u> , Vol. 19,<br>1949.                               |

Mitchell, J.C.

"Preliminary Notes on Land Tenure and Agriculture among the Yao" in Human Problem, 1950.

-

"Labour Migration in Africa South of the Sahara: The Causes of Labour Migration" in Bulletin of the Inter-African Labour Institute, 1959.

Sharpe, A.

"Central African Trade and the Nyasa Waterway" in the Blackwood Magazine, 1892.

-

"Nyasaland" in the Journal of the Royal Colonial Institute, Vol. 39, 1907-8.

-

"A Journey from R. Shire to Lake Mweru" in the Geographical Journal, Vol. 7, 1893.

-

"Geography and Resources of British Central Africa" in the Geographical Journal, Vol. 39, 1912.

Stannus, H.S.

"Notes on Some Tribes of British Central Africa" in the Royal Anthropological Institute Journal 1910.

-

"The Ways of Nyasaland" in the Harvard African Studies. 1922.

INTERVIEWS.

Chief Chakhumbila 1962.  
Chief Gomani 1962  
Kadango 1962  
Katengeza, R. 1964  
Lubani, (Malawi Congress Official) 1962  
Makhumula, L. 1963  
Mwakasungula 1964  
Rev. Michael Scott 1963  
Rodger, J. 1962  
Somanje, (M.P.). 1965

### ERRATA

- ge 36 - last paragraph - line 3 - should read KAPCLO.
- ge 39 - paragraph 2 - line 5 - " " their.
- ge 41 - paragraph 1 - line 8 - " " might.
- " " - " 2 - " 9 - " " here.
- " 45 - " 3 - " 3 - 'it' deleted.
- " " - last paragraph - line 9 - should read GORI.
- " 46 - paragraph 2 - line 3 - delete 's'.
- " 53 - Footnote 1. - should read - Werner, p. 263.
- " 65 - paragraph 2 - line 7 - should read were.
- " 76 - delete Footnote 2 ; and should read IBID pp. 271-272.
- " 81 - Footnote - - p. 133 - insert - The Wavao of Nyasaland, p. 95.
- " 134 - last line - delete 's'.
- " 138 - paragraph 2 - line 5 - should read diviner.
- " 235 - paragraph 2 - last line - should read KOTA KOTA.
- " 243 - paragraph 2 - line 1 - should read pp. 241 - 2.
- " 245 - " " - line 2 - " " MZIMBA.
- " 344 - paragraph 1 - line 5 - should read Chapter six.